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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 645.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

W. O. GADD.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JULY 17, 1913.

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a United States Circuit Court of Appeals, Sixth Circuit.

No. 2295.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
W. O. GADD, Defendant in Error.

Error to the District Court of the United States for the Western District of Tennessee.

Record.

Original Transcript Filed April 3, 1912.

1 TRANSCRIPT OF RECORD.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 4129, C. C.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

Declaration.

Filed July 27th, 1911. Dan F. Elliotte, Clerk.

Now comes the plaintiff, W. O. Gadd, a citizen and resident of Memphis, Shelby County, Tennessee, and sues the defendant, Southern Railway Company, a non-resident corporation engaged in the business of a common carrier and as such engaged in interstate commerce, for Twenty-five Thousand dollars damages, and for cause of action alleges:

That on and before the 25th day of April, 1911, the defendant, Southern Railway Company, was a railroad corporation engaged in the transportation of freight and passengers for hire from Memphis, Tennessee, to various points in Mississippi, Alabama, North Carolina and other States in the Union, and was engaged almost exclusively in interstate commerce, the defendant being chartered and incorporated under the laws of the State of Virginia, but maintaining an office and agency in Memphis, Shelby County, Tennessee. That on the 25th day of April, 1911, the plaintiff was in the employ of said defendant as a railroad fireman and on the night of said April 25th, 1911, plaintiff, as a railroad fireman as aforesaid, was engaged, in conjunction with engineer, Smith Hunter, and the balance of the

switching crew in making up fast freight train No. 74 in the yards of the defendant company in Memphis, Tennessee, which train is an interstate train consisting of cars loaded with freight for various points in Mississippi, Alabama, Georgia and other States in the Union, and the plaintiff and his co-employés were at the time actually engaged in handling cars loaded with freight destined for points in various states other than the State of Tennessee, when at about 10:30 o'clock on the night of April 25th, 1911, plaintiff was directed by said engineer, Smith Hunter, who was at that time plaintiff's superior, and in charge of said engine and who had a right to direct and command this plaintiff in the performance of his duties, to make an inspection of the engine for the purpose of dis-
2 covering and remedying a certain defect therein. That pursuant to the command and direction of Smith Hunter plaintiff alighted from said engine at a place in the yards of the defendant in Memphis, Tennessee, between Madison and Monroe Avenues, and while examining same, said engineer suddenly started the engine backward without any warning to the plaintiff. Plaintiff thereupon stepped upon the footboard of the locomotive in question and rode until the engine was again stopped, when plaintiff stepped off the footboard on the front of said engine and started walking towards the cab on the engineer's side for the purpose of boarding the engine and taking his proper place in the cab. Said engineer knew that plaintiff had been on said footboard, or by the exercise of ordinary care could have known it, and knew that plaintiff was at the time starting towards the cab for the purpose of resuming his regular place therein, when without any direction from the plaintiff, and while the engine was standing still, (said engineer started his engine and was moving slowly forward, whereupon) plaintiff caught hold of the hand holds provided for that purpose on the cab of the locomotive and on the engineer's side, had stepped upon one of the steps leading to the cab, all of which was well known to said engineer, when said engineer recklessly and negligently suddenly applied the steam with full force, so that said engine was caused to jump or leap or jerk suddenly forward and with such suddenness and force as to throw plaintiff from his place on the steps of said cab, jerk loose his hold upon the hand holds, and throw him beneath the locomotive, with the result that the wheels of the locomotive passed over his left leg, greatly crushing and mangling same and necessitating the amputation thereof just below the knee.

Plaintiff and said Smith Hunter, the engineer, and their co-employés were at the time engaged exclusively in making up fast train No. 74, an interstate train, as aforesaid, and were at the time engaged in switching and handling cars loaded with interstate commerce, which cars they were placing into said train, and plaintiff, with said engineer, and all of their co-employés were at the time of the accident engaged in interstate commerce.

Plaintiff languished for many weeks in the hospital, suffering great physical pain and mental anguish, and his leg amputated just below the knee, as above stated, was seriously and permanently injured, the shock to his constitution has greatly impaired his health

and plaintiff is now unable to follow the vocation of railroad engineer or fireman, his earning capacity has been greatly impaired.

3 Wherefore, plaintiff, W. O. Gadd, sues the defendant Southern Railway Company, for Twenty-five Thousand dollars and demands a jury to try the issues when joined.

Second Count.

Now comes the plaintiff, W. O. Gadd, and sues the defendant Southern Railway Company, for another Twenty-five Thousand dollars damages, and for cause of action alleges:

Plaintiff herein adopts and repeats all of the allegations set out in the Count one with reference to the residence and business of the plaintiff and with reference to the residence and business of the defendant, and the fact that the defendant was on April 25th, 1911, and for a long — prior thereto, and is now a common carrier engaged in Interstate commerce and is engaged largely in the transportation of freight and passengers in interstate commerce and beyond the State of Tennessee and to other states in the United States.

That on the night of April 25th, 1911, plaintiff as a fireman in conjunction with Smith Hunter, an engineer in the employment of the defendant, and the balance of the switching crew, was engaged in making up an inter-state freight train, which train was to carry cars loaded with freight destined to various points in Mississippi, Alabama, Georgia, and other states of the Union, and while the plaintiff and his co-employés were so engaged, plaintiff was directed by Smith Hunter, who was at the time his superior, and whose directions and commands plaintiff was required to obey, to investigate and ascertain the cause of certain noise or scraping upon the wheels of the switch engine which they were at the time operating in the making up of said interstate train, and that pursuant to said command plaintiff left his position in the cab of said engine, alighted upon the ground, and went to the forward end of the locomotive on the engineer's side for the purpose of making said inspection. That while doing so, the engineer suddenly started his engine backward without warning to plaintiff or without any signal from plaintiff so to do. This movement made it necessary for plaintiff to mount the footboard of the locomotive so as to ride with it until the next stop. Said engine proceeded backward a distance of several yards, when, in pursuance to signals from the switching crew, who were engaged, as aforesaid, in making up said interstate train and handling cars loaded with interstate commerce, stopped. Plaintiff thereupon left his aforesaid position upon the footboard on front of engine and started back to the cab on the engineer's side of the engine

4 for the purpose of resuming his proper place in the cab. Just before or at the time plaintiff got opposite the steps to the cab said engineer started said engine forward with the result that plaintiff stepped upon the step entering said cab, caught firmly and securely to the hand holds with both hands, and was about to enter the cab, when said engine struck a rough, loose, unsafe and inse-

cure place in the track upon which it was traveling, with the result that said engine was caused to jerk, jump or sway with such suddenness and with such force and violence as to throw the plaintiff from his aforesaid position beneath the wheels of the locomotive with the result that his left leg was badly crushed and mangled, and plaintiff received other serious and permanent injuries, languished in the hospital for several weeks, where he suffered great physical pain and mental anguish. Plaintiff's left leg was amputated just below the knee, he has been seriously and permanently injured, is unable to follow his vocation as a railroad engineer or fireman, at which plaintiff has spent many years and in which he had qualified for advancement, his earning power for life has been greatly reduced. Plaintiff did not know of the loose, rough and unsafe condition of the track at the point in question.

Plaintiff's duties required him to work at night and plaintiff had neither the opportunity nor the occasion, nor was it his duty to inspect the tracks of said defendant company to ascertain whether or not they were in a safe and fit condition for the performance of switching operations thereover, but plaintiff relied, as he had a right to do, upon the belief that the defendant would keep its tracks in its yards in a proper and suitable state of repair, well knowing that it was necessary for switchmen and other employés constantly to catch and mount moving engines and cars while engaged in switching operations, and well knowing that its various employés frequently stand or have to stand upon the steps, platforms, or running boards of moving engines and cars, and that rough and unsafe places in the track would cause them to be thrown therefrom in the same manner that the plaintiff was. Plaintiff avers that the negligence of defendant company in not keeping and maintaining its track in its busy switching yards at the point in question in a proper state of repair, and permitting the same to become so loose, insecure and irregular as to cause the sudden jump or jolt above described, was gross, wanton and reckless, and evinced an utter disregard for the safety of its employés.

5 Wherefore plaintiff, W. O. Gadd, sues defendant, Southern Railway Company, for Twenty-five thousand dollars damages and demands a jury to try the issues joined.

JOHN L. STOUT,
Attorney for Plaintiff.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 4129 C. C.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

Cost Bond.

Filed July 27th, 1911. Dan F. Elliotte, Clerk.

Know All Men By These Presents, that we, W. O. Gadd, No. 1086 Walker Avenue and H. S. Smith, 1120 Walker Ave., and A. N. Radford, Real Estate Agent held and firmly bound unto said defendant in the sum of Two Hundred and Fifty Dollars; but to be void on condition that the said defendant Southern Railway Company do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the Circuit Court of the United States for the Western District of Tennessee, at said Memphis, against said defendant; and also on failure of the said plaintiff to prosecute the said suit with effect; and also on failure of the defendant, if convicted, to pay said costs.

Witness our hands and seals this 26th day of July, A. D. 1911.

W. O. GADD.
H. S. SMITH.
A. N. RADFORD.

Approved and asknowledged before me, the 26th day of July, A. D. 1911.

DAN F. ELLIOTTE, *Clerk.*

UNITED STATES OF AMERICA,
District Court of the United States, Western District of Tennessee, Western Division:

In the District Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its May Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 27th day of July, A. D. 1911, in the following cause to-wit:

No. 4129, C. C.

W. O. GADD
VS.
THE SOUTHERN RAILWAY COMPANY.

6 *Order for Process, Etc.*

This day came counsel for the Plaintiff and presents to the Court a Bond for Costs, together with his declaration herein and moves for leave to file and docket same which motion on consideration, is granted and allowed: It is therefore ordered by the Court that said Declaration be filed and entered upon the dockets of this Court and the Clerk is hereby directed to issue summons, with copy thereof, for service on the defendants therein named, returnable to the coming November Term of this Court.

The President of the United States of America to the Marshal of the Western District of Tennessee, Greeting:

You are hereby commanded to summon the Southern Railway Company, a foreign corporation, having an office and doing business within this District, citizen of the State of Tennessee, if to be found within your District, to appear before the Judge of the Circuit Court of the United States, in the Sixth Circuit for the Western District of Tennessee, at Memphis, Tennessee, in said District on the fourth Monday in November next, A. D. 1911, and then and there to answer W. O. Gadd, citizen of the State of Tennessee, in a plea of Tort, (Personal injuries) to the damage of said Plaintiff (as he say-) Fifty thousand ($50,000.00) Dollars. Herein fail not, and have you then and there this Writ.

Witness the Hon. Edward D. White, Chief Justice of the Supreme Court of the United States, and the Seal of said Circuit Court at said Memphis, this 27th day of July, A. D. 1911, and the 136th year of American Independence.

[SEAL.] DAN F. ELLIOTTE, *Clerk.*

Marshal's Return.

This writ came to hand on July 28th, 1911, and I duly executed the same, as therein commanded, by making the contents thereof known to the within named defendant, The Southern R. R. Company, by leaving copy of summons with F. P. Pelter, Sup't for said Company, at Memphis, Shelby County, Tennessee, on the 28th day of July, 1911.

J. SAM JOHNSON,
U. S. Marshal,
By ZACH JOLLY, *Deputy.*

Marshal's Fee & Exp. $2.10.

7 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 4129, C. C.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

Pleas of Defendant.

Filed Nov. 28th, 1911. Dan F. Elliotte, Clerk.

1.

Now comes the defendant and for plea to the first count of plaintiff's declaration says:

(1) It is not guilty of the matters and things as in said declaration averred.

(2) The injuries of the plaintiff were due to and caused by his lack of ordinary care.

(3) The plaintiff alleges that he was a fireman and he assumes the risks incident to boarding and alighting from moving engines in the ordinary course of business.

(4) The injuries inflicted upon the plaintiff and of which he complains were inflicted by a fellow servant, to-wit: Smith Hunter, engineer.

Wherefore, defendant denies liability to the plaintiff.

2.

Now comes the defendant and for plea to the second count of plaintiff's declaration, says:

(1) It is not guilty of the matters and things as in said declaration averred.

(2) The injuries of the plaintiff were due to and caused by the lack of ordinary care.

(3) The plaintiff alleges that he was a fireman and he assumes the risk incident to boarding and alighting from moving engines in the ordinary course of business.

(4) The injuries inflicted upon the plaintiff and of which he complains were inflicted by a fellow servant, to-wit: Smith Hunter, engineer.

Wherefore, defendant denies liability to the plaintiff.

CARUTHERS EWING,
Attorney for Defendant.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

For replication, the plaintiff joins issue on defendant's pleas.

JOHN L. STOUT,
Attorney for Plaintiff.

8 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 4129.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

Notice.

Filed December 5th, 1911. Dan F. Elliotte, Clerk.

To Mr. Caruthers Ewing, Attorney for Defendant, Take Notice:

I will on Saturday morning, December 9th, 1911, upon the opening of Court, make application to the Court to set for trial at the present term the above styled case.

JOHN L. STOUT,
Attorney for Plaintiff.

Service accepted.
CARUTHERS EWING.

12-5-11.

UNITED STATES OF AMERICA,
District Court of the United States, Western District of Tennessee, Western Division:

In the District Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 19th day of January A. D. 1912, in the following cause to-wit:

No. 4129, C. C.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

Order, Allowing Amendment to Declaration.

The plaintiff, by attorney, after the conclusion of the testimony herein and before submission of the cause to the jury having moved

the Court for leave to amend the first count of his declaration so that the allegations would conform to the proof, and leave to so amend being granted by the Court, said first count of plaintiff's declaration is amended as follows: by striking out four lines on page 2 of said declaration beginning with "said engineer" in the 9th line from the bottom of page 2 and ending with "to the cab" in the 5th line from bottom of page 2 and inserting in lieu thereof the following, viz:

"And while the engine was standing still, and just as plaintiff attempted to board the engine on the engineer's side and had
9 caught hold of the handholds provided for that purpose on the cab of the locomotive and on engineer's side and was in the act of stepping on the steps leading to the cab on said engineer's side."

UNITED STATES OF AMERICA,
District Court of the United States, Western District of Tennessee, Western Division:

In the District Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 19th day of January A. D. 1912, in the following cause to-wit:

No. 4129, C. C.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

Judgment.

This day came the defendant by its attorney and the plaintiff by his attorney, and also a jury of good and lawful men, to-wit: Sam Schloss; E. W. North; J. J. Pulliam; M. V. Crump; A. M. Applewhite; Jno. M. Ray; J. H. Bowen; D. J. Crisp; W. H. Seabrook; W. L. Gray; H. C. Drake; and S. G. Price, who being duly selected empanelled tried and sworn to well and truly try the issue herein joined and a true verdict render according to the law and the evidence, and the jury having heard the testimony, listened to the arguments of the Counsel, and received the charge of the Court, upon their oaths do say they find the issue herein joined to be in favor of the plaintiff and against the defendant and assess the amount of the plaintiff's damages and recovery herein against said defendant at the sum of Ten Thousand Dollars ($10,000.00).

It is therefore considered and adjudged by the Court that the plaintiff, W. O. Gadd, do have and recover of and from the defendant, Southern Railway Company, said sum of Ten Thousand Dollars ($10,000.00) together with all costs herein accrued for the collection of which execution is hereby awarded.

UNITED STATES OF AMERICA,
District Court of the United States, Western District of Tennessee, Western Division:

In the District Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

10 Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 19th day of January A. D. 1912, in the following cause to-wit:

No. 4129, C. C.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

In this cause comes the defendant and tenders the Court its Bill of Exceptions, which being examined and found correct is signed and sealed and ordered to be made a part of the record.

In the District Court of the United States for the Western Division of the Western District of Tennessee.

No. 4129, C. C.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

Bill of Exceptions.

Filed February 19th, 1912. A. G. Mathews, Clerk.

Be it remembered this case came on to be heard on this the 19th day of January, 1912, in the District Court of the United States, for the Western Division of the Western District of Tennessee, Hon. John E. McCall, Judge presiding, Mr. John L. Stout, counsel representing the plaintiff, and Mr. Caruthers Ewing representing the defendant, wherein the following proceedings were had:

After the selection of a jury which was satisfactory to both plaintiff and defendant, the counsel for the plaintiff stated his side of the case to the jury as follows:

Mr. STOUT: Gentlemen of the jury, Mr. Gadd, the gentleman sitting here sues the Southern Railway Co. for damages for the loss of a leg—the left leg occasioned while he was in the employment of the Southern Railway as a fireman on a switch engine in the yards of the defendant Railway Co. in this City.

We expect to prove that Mr. Gadd went to work on the night of April 25th, 1911, about 7 o'clock as a fireman on the switch engine of which Mr. Smith Hunter was the engineer. That he was under the directions of Mr. Hunter, and along about 10:15 or 10:30 that night, Mr. Hunter directed Mr. Gadd to take his torch and get down off the engine and see what the trouble was with the engine. It seems there *was* some sparks flying from the wheel. Mr. Gadd, in obedience to his directions, took his torch and got down off the
engine on the right hand side, which is the engineer's side,
11 as you gentlemen probably know, and was looking over the
driving wheels of the engine which was standing still at the time, trying to see what the trouble was. Mr. Hunter, the engineer, without any warning whatever, while Mr. Gadd was looking over the driving wheels, moved his engine backward; and Mr. Gadd had to jump out of the way in order to keep from sustaining an injury then, and as the footboard of the switch engine, which is there for the purpose of employees and crews of switchmen stepping off and on at ease—when the engine moved backward, he stepped up on the footboard on the front of the engine and remained there until the engine again stopped. Then he got off of the footboard on the engineer's side, torch in hand, in plain view of the engineer, and walked towards the cab to resume his position in the cab, and was in the act of stepping up in the cab when, without any warning to Mr. Gadd, without any signal from Mr. Gadd, the engineer started his engine suddenly forward, thus throwing or jerking Mr. Gadd's handhold loose from the engine and throwing him underneath severing his leg just below the knee.

We think we will be able to show by a clear preponderance of the evidence, that the accident occurred just as I have told you. And if we do, of course we will expect to recover."

Thereupon, Mr. Ewing, counsel for the defendant, stated the case of the Southern Railway to the jury as follows:

Mr. EWING: If the Court please and you, gentlemen of the jury, the defendant will submit to the jury evidence to establish the following facts; if the jury believes that this represents the truth of the case, we will say we are not liable, however, we regret the misfortune:

That Mr. Gadd, as fireman, a switch fireman, that is to say working in the yards in making up and breaking up of trains and constantly on and about the train was there and that he left the engine at the request of the engineer to examine to see what it was that was creating the friction in the movement of the driving wheel. I suppose, your Honor, that had nothing whatever to do with the accident but it was prior in point of time to any accident. Mr. Gadd had gotten off and found it was the end of a spring touching it and amounted to nothing whatever and got back into the cab; the fact is that the headlight was somewhat dim and the engineer commented on that fact.

We expect to show that we don't know how *come him* to leave the engine while switching around there, but his statement was
that he left it for the purpose of fixing the light, and we
12 expect to show that he mounted this engine while it was
moving, mounted it in the dark, holding a torch in his hand.

That in his effort to mount it, being handicapped with this torch, he missed his footing, that the engine was started in ordinary and, usual way, that it was in motion when he undertook to mount it.

That the fireman and any other person employed in and about a railroad yard, assumes all the risk incident to his employment; that that is part of his job and that when this gentleman undertook, with a torch in his hand, undertook to mount an engine that only had a running board on it, in the dark, and which engine we expect to show was moving. We expect further to show, if the Court please, that as the jury will observe from the statements of both, that this was a switch engine and there is a switchboard there to mount on; of course in the movement of all trains there is some motion; we expect to show practically all the information we have about the accident is from Mr. Gadd, and his statement as to this occurrence, twice made, is in accordance with the statement which I have made.

The COURT: Let me see the declaration there.

Thereupon Plaintiff presented the following proof in support of the allegations made in his declaration:

Plaintiff's Evidence.

W. O. GADD, the first witness, being duly sworn, testified as follows:

Direct examination by Mr. STOUT:

Q. State your name?
A. W. O. Gadd.
Q. Were you on April 25th, 1911, in the employ of the Southern Railway Co. in the City of Memphis?
A. Yes, sir.
Q. What was your employment with the Southern Railway Co.?
A. On that night?
Q. On that night.
A. Firing that night.
Q. On what?
A. Switch engine No. 1593.
Q. The property of the Southern Railway Co.?
A. Yes, sir.
Q. Where were you engaged?
A. In the yard between Union and Madison.
Q. In the City of Memphis?
13 A. Yes, sir.
Q. Who was the engineer?
A. Smith Hunter.
Q. Was he also in the employ of the Southern Railway Co.?
A. Yes, sir.
Q. At what time did you go to work that night Mr. Gadd?
A. At 7 o'clock.
Q. Did you work from 7 o'clock at night until a certain hour in the morning?
A. Usually got off at 7.

Q. Seven in the morning?
A. Seven at night; six in the morning I usually got off.
Q. After you got to work that night what did you do?
A. Went to work making up 74.
Q. What do you mean by 74?
A. It was a freight train.
Q. What kind of freight train?
A. That is the interstate train.
Q. What do you mean by interstate train?
A. One that carries freight to other states other than Tennessee.
Q. That is what is spoken of as a manifest train?
A. Yes, sir.
Q. Is that the most important freight train or not——

Mr. EWING: I object to that; what is the materiality of the importance of the train?
The COURT: I don't see there is any.

Q. Where did that train run to?
A. It runs through Tennessee, Mississippi and Alabama.
Q. Does it carry cars from Tennessee to those other states?
A. Yes, sir.
Q. Did you say you were engaged at the time of the accident in making up this interstate train No. 74?
A. Yes, sir.
Q. What time did you commence your duties?
A. That night——
Q. In making up the train?
A. The first thing we started at that night after 7 o'clock.

Q. What did you do Mr. Gadd?
14 A. Went to work to get out the cars on the south yard there for the train, and after we had switched the cars from the North tracks on the south yard, then we went up to work what is known as Vance Street to get out some cars there for the train. We went on up the hill then to the junction getting a lot of stuff there.
Q. What Junction?
A. The K. C. Junction.
The COURT: The Kansas City Junction?
A. Yes, sir, about two miles south of the main yard—we got a lot of stuff delivered by the I. C. there and other roads to put in this train. We did not leave up there until 10 o'clock or after. As we were coming down the hill I noticed something wrong—I noticed sparks flying on the left side from the front driver. I called Engineer Hunter's attention to it. We were right about Vance Street, and he said as soon as we get down the hill to get down and see about it.
Q. Was the engine headed North?
A. Yes, sir. And we went on down the hill and got to Union Street and some friend of Hunter's came up on the engine and we shoved on down and made a switch and after we got North of that

Monroe Street bridge and Hunter said, grab your torch and see what this is. I got the torch and started down the fireman's side and before I got to the ground he started again, and I got back on the engine, and I said I can't examine it if you don't stand still a minute, and he said, wait until we stop again. I don't remember, but it seems to me like he shoved several car lengths further North and we were closer to Madison Street than Monroe Street bridge. When he stopped I said, Hunter, give me a chance and I will get down and see what that is, and he said, hurry up. I got the torch and got down on the Engineer's side and stepped to the driver where I could see. I was standing there looking under to see what the trouble was and didn't get to tell because he started backward.

Q. He started back? Who?

A. Hunter did, with the engine, started backing South.

Q. Did you know he was going to back?

A. No sir, I got no warning of any kind.

Q. Did you give any signal?

A. No, sir, I stepped out of the way and as the front foot board passed, I got on; he backed up to the switch and stopped and I stepped off and walked back to get in the cab, my torch burning all the time. Just as I turned and made an effort to get on, the engine started forward.

15 Q. How did it start forward?

A. Started with a sudden jerk.

Q. Did you have any notification that the engine was going to start?

A. No sir, I didn't know anything about it.

Q. Did you give any signal?

A. No, sir.

Q. Were you walking from the footboard to resume your position in the cab on the engineer's side?

A. Yes, sir.

Q. Was that done in plain view of the engineer?

A. Yes, sir, it was in plain view.

Q. You had, I believe you say, a torch?

A. Yes, sir.

Q. Engineers and firemen use torches?

A. Yes, sir, the only crew that uses them.

Q. It was——

The COURT: I have not found how he was hurt yet.

Q. After you started to get up in the engine, the engine started forward with a jerk?

A. Yes, sir.

Q. Then what happened?

A. It jerked my hold loose and I fell under the engine.

The COURT: Had you stepped to the cab?

A. No sir, I was just reaching to make my hold——

The COURT: Hold of what?

A. The hand holds on the engine and on the cab.

The COURT: Then what occurred?

A. It jerked me loose and jerked me under.

The COURT: Under what,—the engine?

A. Under the tank. And having my foot up to catch that way, when it jerked me, it jerked me under the tank.

Q. Did the engine run over your leg?

A. The tank.

Q. It was the tank of the switch engine of the Southern Railway?

A Yes, sir.

Q. The engine was at that time operated by whom?

A. Smith Hunter.

Q. He was the engineer in the employ of the defendant?

A. Yes, sir.

Q. Who was on the engine Mr. Gadd at the time of this accident beside Mr. Hunter?

A. I don't know sir, some friend of Mr. Hunter's I don't know who it was.

Q. You don't know who it was?

A. No, sir, he told me but I forget.

16 Q. After you were thrown under the engine what happened?

A. As soon as I fell under the engine I hollered and this friend of Hunter's jumped down off the engine and ran down and grabbed me and Hunter stopped as quick as he could and he came down there.

Q. He was some distance north of you?

A. Yes sir the engine had moved off or something; I don't remember, suffering like I was, how far it was, but it seem- to me like it was about the near end of the tank.

The COURT: Was it the front wheels of the tank that ran over you?

A. Yes, sir.

Q. What became of you after the accident?

A. They kept me around there for some time; I don't know how long, until I like to bled to death, and finally the ambulance came and they sent me to the City Hospital.

Q. What happened after you got to the City Hospital?

A. They had to amputate my leg.

Q. Where wos your leg amputaaed?

A. Five inches below the knee—about five inches.

Q. Five inches below the knee?

A. Yes, sir.

Q. I will hand you a book which purports to be the rules——

Mr. EWING: We agree it is the book of rules; he need not identify it.

The COURT: All right. Let the record show the book offered by counsel for the complainant is the book *or* rules of the Southern Railway, and marked Exhibit "A" to this witness' testimony.

Mr. EWING: Being book No. 29708.

The COURT: Book No. 29709?

Mr. EWING: Yes, sir.

Q. Is the engine man or engineer responsible for the——

Mr. EWING: One moment. I want to object to the rule and let your Honor rule, on the ground it is not pertinent to any evidence offered here.

The COURT: Let me see that. Which rule it it, 501?

Mr. STOUT: Yes sir, 501.

Mr. EWING: The specific objection being that the rule with respect to instructing firemen or the engineer telling him his duties—holding the engineer responsible for matters of that sort, simply tends to confuse this issue, and are not pertinent to anything involved, and it matters not whether the engineer is responsible for his equipment or should instruct the firemen—it is not pertinent to
17 this issue.

The COURT: The objection is overruled.

Mr. EWING: Note our exceptions.

The COURT: Read the rule.

Mr. STOUT: "Rule 501. They are responsible for proper management of the engines in their charge, for the care of their equipment and for economical use of fuel and supplies. They are also responsible for the performance of duty by their firemen, must instruct them in such duties, when necessary, and must report incompetence or neglect of duty upon their part to the Superintendent or to the Master Mechanic, as the circumstances may require."

The COURT: It is the first clause of that rule I think is competent and material I mean.

Mr. STOUT: I just read it all.

The COURT: All right, Go ahead.

Mr. EWING: There are several first clauses; that is, as to what?

The COURT: The management of the engine.

Mr. EWING: I agree to that without regard to the rule.

The COURT: I admitted it on that ground. To say the least of it it could not prejudice the defendant.

Mr. EWING: This rule 554 is objected to and it reads as follows: "They must instruct their firemen in all matters pertaining to the operation and care of engines, and may allow them to handle the engine at stations, under their immediate supervision, but must not permit them to do so under any other circumstances without written authority from the Master Mechanic."

The COURT: I don't think it is material Mr. Stout; You have shown or I believe you have, that he was under the orders and direction of the Engineer.

Mr. EWING: I have no objection to that part of No. 574 reading as follows: "When with an engine they (the fireman) must obey the orders of the engineman." That is not objected to.

Mr. STOUT: He does not object to that.

The COURT: Very well; that goes in this evidence, in other words, I understand this book is introduced as the book of rules and any rule material can be read by counsel?

Mr. EWING: Yes, sir, but we would like to know what rules. We object to 563 as immaterial. We object on this ground: that

this fireman, Mr. Gadd, had the rules and knew it and does not pretend that he objected to it, and does not claim that he did or that it was responsible for his injury, but even if it was, if he did not object to it, he waived it. The Court overruled the ob-
18 jection and the defendant excepted.

Mr. STOUT: No. 563 reads: "That they must not allow any person to ride upon their engines except the General Officers of the Operating Department; Superintendents, Train Master, Master Mechanics, Road Foreman of Engines and Road Masters on their Divisions; Track Supervisors on their subdivision; trainmen of their own trains and flagmen of other trains taken without a written order from the General Manager, the General Superintendent or the Superintendent.

Q. Was the person that was on the engine or in it at the time you were injured, in the employ of the Southern Railway?

A. Yes, sir, there was a man on there.

Q. I say, was he employed by the Southern Railway?

A. No sir he was hanging around the saloon that Hunter was running up there in North Memphis is all I know.

Q. What was it that caused you—I believe you stated though that the sudden starting and jerking of the engine caused you to be thrown under?

A. It was the starting without warning; I didn't know he was going to start at that time.

Q. Did Hunter know that you were there examining the engine?

A. He sent me there for that purpose; he ought to know it.

Q. Were you in plain view?

A. Yes, sir.

Q. There was no reason why he should not see you?

A. None whatever.

Mr. EWING: I object to that; let him state the facts.

The COURT: Yes sir, let him state the facts; it is for the jury to determine whether he did or not.

Q. After you were taken to the Hospital, how long did you remain there?

A. 13 days.

Q. Did you suffer any pain or not by reason of your injury?

A. I suffered all the time; I am suffering until yet.

Q. What was your earning capacity at the time you were injured Mr. Gadd.

A. Well I earned—promoted to engineer, that paid at that time $115.50.

Mr. EWING: What was that statement?

Mr. STOUT: He had been promoted to engineer. In other words, an extra engineer?

19 A. Yes, sir.

Q. You had been promoted?

A. Yes sir, I fired what time I was not running.

Q. What was your average earning capacity, working as engineer and fireman?

Mr. EWING: I wish to limit the amount of his earning purely to the salary in the place he held at this time and not matters of promotion in the future of promotion to become effective in the future.

The COURT: He said he was promoted to extra engineer. running extra so I understand.

A. Yes sir, running extra since July 23rd, 1907.

The COURT: And while not running extra engineer, he was firing?

Mr. STOUT: He was firing on this night.

COURT: Show what he was receiving and his salary.

Mr. EWING: I misunderstood it.

The COURT: What were you receiving per month or earning per year at this time?

A. $115.50 what it paid as engineer.

Q. What was your average earning capacity per month?

A. At that time it was something like $100.00.

Q. Your average earning capacity was $100.00 per month?

A. Yes sir, counting the firing, hostling and running all combined.

Q. What are you doing now?

A. Nothing since I was hurt.

Q. You were hurt April 25th., 1911?

A. Yes, and from the condition of my leg I don't know whether I ever will be able to do anything or not.

The COURT: What is its present condition?

A. The bone—the outside bone they took off plumb up to the knee and the other bone they left five inches and it may necessitate another operation.

The COURT: Is it healed?

A. Yes sir, but a piece of loose bone is left in there and has formed a knot on the side of it, and I suffer all the time.

Q. Have you done any work since the accident?

A. I have not been able to do anything.

Q. Have you not been rendered unable by reason of your accident, and are still in that condition?

A. Yes, sir.

Cross-examination by Mr. EWING:

Q. Mr. Gadd, you were given a book of rules when you went into the service of the Company and required to sign a written
20 application that in all matters you would follow those rules?

A. I will ask you if this is the application you signed (Hand written instrument to witness.) Is that your signature or did you write that?

A. Yes, sir I wrote it.

Mr. EWING: We introduce it in evidence; it is not at all material —certain words; We claim the following to be material.

"I further plainly and explicitly understand, and now take notice as a part of this contract and regulation, that no conductor of any train, freight or passenger, or any engineman or fireman, or any other agent of the Southern Railway Company has the right to waive or dispense with or suspend or in any way alter or amend any of the provisions, conditions, contracts, stipulations or regulations contained in this paper writing, or any of the said rules or any rules of the Company.

I am also hereby informed and take notice of the fact and fully understand, that no conductor of a train, passenger or freight, or any engineman or fireman, or any other agent, in and about such trains, or any other person, has the authority to discharge, dismiss or otherwise punish or injure me for adhering strictly to the conditions, stipulations, and regulations contained in this paper, or to any rule of the Company, or for failure to obey any order to violate any of said conditions, stipulations, rules or regulations, and I solemnly agree not to violate any of said conditions, stipulations, rules or regulations contained in this paper writing. I also fully understand that no disregard or violation of any rules of the Company, no matter how frequent or habitual, amounts to a revocation or waiver of such rule, or will justify me in violating it."

Mr. STOUT: I object to the introduction of that because it is not material. He has not shown that Mr. Gadd violated any rules or has not lived up to the rules of the Company.

The COURT: Go ahead, if it is competent all right, if not, I will withdraw it.

Q. I will ask you if you understand now and had in your possession this book containing general rule 11 at page 185, of general regulations?

A. Yes, sir, I had that book. I think I understand the rule at page 185.

Mr. EWING (Reading): Every employé must exercise the utmost caution to avoid injury to himself or to his fellows, especially in the switching of cars, and in all movements of trains, in which
21 work each employé must ook after and be responsible for his own safety. Jumping off or on trains or engines in motion, getting between cars to couple or uncouple them, and all similar imprudences are dangerous and in violation of duty. All employés are warned that if they commit these imprudences it will be at their own peril and risk." Page 185, general regulations.

Q. Is it not a fact this engine was slowly moving up to you and with a torch in your hand undertook to get on this engine in the dark and missed the step?

A. No, sir.

Q. Is it not true Mr. Gadd that engines in their operation and movement invariable—or I might say, most generally have some slight lurching?

A. When running but not when standing still.

Q. I understand; when they are moving around.

A. Yes, sir.
Q. You were making up a train?
A. Yes, sir.
Q. That requires you to couple connections and uncouple cars?
A Yes, sir.
Q. You had been in this service quite a while?
A. Yes, sir.
Q. You had a good large experience making up and breaking up trains?
A. Yes, sir.
Q. I will ask you whether a train starting on a straight pull—whether you start the engine that way—the same as you do in making up and breaking up of trains?
A. When on a straight pull, no sir.
Q. On a straight pull the engine must be started gradually?
A. Yes sir.
Q. In the making up and breaking up of trains in the yard you would have to have a sort of snap start?
A. Yes sir.
Q. And give them a yank—give them a kick or jerk?
A. Yes sir.
Q. You were a fireman and an engineer and knew all about that? About the method of breaking up trains and starting them?
A. Yes sir, kicking them and such like.
Q. When Smith Hunter rushed around where you were, just the front wheel of the tender or tank had passed over; the rear wheels did not get over?
22 A. I don't know how much passed over; I was suffering so I could not tell; the truth is I didn't pay any attention to that part.
Q. When he first got there didn't you say to him, I missed my step?
A. I told him the engine had jerked and caused me to miss the step.
Q. This happened what date?
A. April 25th, 1911.
Q. Do you remember on April 27th you made Hunt here?
A. I remember talking to him.
Q. Don't you remember signing your name and giving a statement that he took down about like you said it?
A. I remember talking to him about it; I don't remember what I told him. When he got through he asked me to read it and I told him I was not able.
Q. Didn't he take down your statement at that time?
A. I don't know what he took down.
Q. You signed a statement?
A. I signed a statement, I don't know whether it was mine or not.
Q. Your mind was perfectly clear.
A. I don't remember anything about that statement that I give. I remember Dr. Thornton and Dr. Rudisill asked me to make a state-

ment; they asked me two questions; I don't remember anything about that at all.

Q. How old is your step-daughter?

A. About 20 or 21.

Q. She was present?

A. Yes sir.

Q. In there when you were talking to Mr. Hunt?

A. Yes sir.

Q. Discussing various other matters besides the accident?

A. I don't remember.

Q. How do you remember your step-daughter was in there?

A. I remember talking to her.

Q. How do you remember that she was there at the particular time Mr. Hunt was there?

A. I remember his being there from his telling me he was going to come back and talk to me about the matter.

Q. I will ask you whether or not you didn't at that time make a statement and sign it that there was no unusual motion or jerk of this train at all at that time?

A. How is that?

23 Q. Did you not then state to Mr. Hunt there was no motion of this train unusual—no jerk about it?

A. I don't know anything about it.

Q. I asked you if you made this statement.

A. I discussed the matter with Mr. Hunt; that is all I remember: I would not have remembered that if my step-daughter had not talked to me about it afterwards.

Q. Was there any unusual motion of this engine?

A. It was standing perfectly still; when I attempted to get on it jerked—wait a minute Mr. Ewing——

Q. I am asking if as a fireman and engineer, there was any thing unusual in the manner of starting this train?

The COURT: Answer yes or no, then explain.

A. Yes, sir, because it started off with an unusual jerk and I will say something else, if there is anything in that statement that is different to the statement I have made under oath, it is a mistake.

Q. Did you not sign a statement at that time,—"I don't notice any rough or unusual handling of the engine?"

A. I don't remember anything about it.

Q. What was there rough and unusual in the handling of his engine—did you say it started off with a jerk?

A. It started off right at the time that I attempted or when I was in the act of boarding it in plain view of the engineer.

Q. That is another proposition; I didn't *not* ask about the engineer; I am trying to get at what was unusual.—that is the way you start it off.

A. The way to kick a car.

Q. That is the customary way of handling them in the yard?

A. When going to kick a car.

Q. Why was it unusual when that was the regular and customary way that you all did it?

A. It was an unusual way at that time.

Q. That is because Smith Hunter saw you?

A. He had sent me down there Mr. Ewing to examine that engine and never gave me an opportunity to get back where I belonged.

Q. I will ask you if this engine was not moving by you—I will ask you if it is not a fact, you were on the ground looking under the engine and started to get back on the engine when Hunter the engineer started the engine ahead and when the step under the cab window reached you, the engine was moving about two miles an hour—is that true?

A. State that again.

24 Q. When you were up in front and the engine was moving, and when the cab of the engine—the step under the cab reached you, that the engine was moving about two miles an hour?

A. It is not.

Q. That is not true?

A. No, sir.

Q. I will ask you if this is not true; you then reached out with your right hand and took hold of the hand hold and had the torch in your left hand?

A. I had the torch in my left hand.

Q. Did you take hold with your right hand?

A. Just as I was in the act of taking hold it started—just as I was getting hold of it; I was not expecting the motion at all and it jerked me loose.

Q. Did you not take hold of that engine while in motion with your right hand?

A I did not.

Q. Were you thrown by a lurch to one side?

A. I was thrown by the sudden start.

Q. When you took hold with your right hand the engine gave a lurch to one side and caused you to slip your hand hold.

A. When I went to step on it started off; I don't know anything about the lurch or anything.

Q. It was a side lurch that threw you?

A. It was just a sudden jerk of the engine at that particular time that caused it.

Q. The step and the hand hold on the engine were in good order.

A. So far as I know; I could not tell under the condition I was in.

Q. The only thing you could possibly attribute this injury to immediately after the accident was the fact that he had moved the engine and that when you went to get hold of it a sudden lurch or motion caused you in the dark to miss the foot rail; ain't that the only thing you could think of after the accident that caused you to get hurt?

A. After that I don't remember.

Q. The track was all right?

A. I don't remember anything about the track.

Mr. EWING: Let me have the declaration, your Honor.

Q. I will ask Mr. Gadd to look at this and see if he signed that, and look at the end of it.

A. Yes, sir, I signed my name, but as to the contents I don't remember anything about it.

25 Q. Is that not about as good as you can write your name at any time?

A. Not unless I was mighty nervous.

Q. Is it not just as good as you wrote it when applying for a position when writing with a pen and ink?

The COURT: He says he signed it.

Q. You signed that knowing what it was?

A. No sir, I did not. If I had been able, I would have read it; I just simply signed it to keep from being bothered with other questions; under the conditions I was not able to be disturbed.

Q. Wasn't Mr. Hunt courteous and polite to you?

A. Yes, sir. Let me tell you if you suffered like I did, and not able to turn your head over like I was three or four days I signed it and never knew what it was.

Q. Did you sign that knowing what it was?

A. I signed it—talking to Mr. Hunt—he read that over; I don't remember what it was.

Q. I want to read the statement since he said he signed it.

Mr. STOUT: We object to that: he said he didn't know what was in it.

Mr. EWING: We are not bound by that.

The COURT: The jury will say. The Court cannot pass upon that as a question of fact here. The witness said his condition—that he was reduced to great weakness by reasons of the loss of blood and was not able to turn his head; the jury will say whether or not he was capable of understanding the paper like that by which he would be bound.

Mr. EWING (Reading): On the night of April 25th, 1911, I was firing engine 1593 with engineer Smith Hunter, switching between Monroe and Madison in the Memphis yards. The engine was headed West; one car was coupled in front. I noticed fire coming from under the engine and called engineer Hunter's attention to it and he asked me to get down and see what it was. I got down and looked under the engine and part of the left front spring saddle had worked out. About the time I saw what it was he backed the engine up and I caught on the front of the pilot and rode up until he stopped again got off, I meant to look under the engine and started back to get on the engine when he started the engine ahead and when the step under the cab window was right at me, the engine was moving about two miles an hour and I reached out with my right hand to take hold of the handhold and I held a torch in my left hand. Just as I took hold with my right hand, the

26 engine gave a lurch to one side. This caused me to miss my foot hold and my hand slipped off the hand hold and my

left foot went under the tender and was cut off. The steps and the hand holds on the engine were all O. K. in good order so far as I know. The only thing I can attribute my accident was the engineer moving the engine before I could get back on it after he sent me back to see what was the matter underneath. I didn't notice any rough or unusual handling of the engine. (Signed) W. O. Gadd."

Q. Except for the sudden jerk feature that is a very intelligent and accurate account of the transaction; that is the way it happened is it not?

A. It happened when he started it up.

Q. Is this statement accurate in every way except the engine had been moved before you undertook to get on—is that the only inaccuracy in it.

A. No, sir, it is not—about the hand holds and about the track I don't remember anything about it, because I was not able.

Q. You were there every day running right over it all the time?

A. I have been running over it every night and I was informed afterwards that they were working on it.

Q. You had been working right on the track and knew the condition of it?

A. I didn't know how it was at that particular place.

Q. Hadn't you been working there for a year?

A. Yes, sir.

Q. And been going up and down every day with trains and engines?

A. Yes, sir.

Q. Going over the track for a number of years, riding over it didn't you get some idea which it is a good track?

A. I got some idea of the neighborhood of it.

Q. You thought it was a good track?

A. I never thought anything about the track.

Q. And about the condition you could not tell; about the hand holds, you had been riding the engine before you were hurt and going up and down on it?

A. Yes, sir.

Q. How long had you known the engine and been working upon it?

A. Three or four years.

Q. You were in position to know whether it was in good condition?

A. I didn't know anything about it.

27 Q. You had been on it that night.

A. Yes, sir.

Q. State whether in going up and down it it was in good condition.

A. Yes, sir, I believe the safety appliances were all right.

Q. What safety appliances?

A. The grab irons, steps, and things of that kind.

The COURT: There is no predicate made here for recovery on the prefect condition of the engine?

Mr. STOUT: No, sir, just in regard to the negligence of the engi-

neer in not observing and taking notice of the fireman there and starting without warning.

Mr. EWING: I will just read your Honor the declaration. "Just before or at the time plaintiff got opposite the steps of the cab said engineer started said engine forward with the result that plaintiff stepped upon the step entering said cab, caught firmly and securely to hand holds with both hands, and was about to enter the cab, when said engine struck a rough, loose unsafe and insecure place in the track upon which it was traveling, with the result that said engine was caused to jerk, jump or sway with such suddenness and with such force and violence as to throw the plaintiff from his aforesaid position beneath the wheels of the locomotive with the result that his left leg was badly crushed and mangled."

The COURT: Is that the only allegation?

Mr. EWING: That is the second count.

Mr. STOUT: And no evidence introduced at all in regard to it.

Mr. EWING: I don't know what a man is going to prove. That is the averment, that he got hold of it good and strong.

Q. So far as you knew from traveling over and about it, the track was al- right?

The COURT: Do I understand you to say that you are basing your suit on the first count?

Mr. STOUT: Yes, sir.

Mr. EWING: Is the second count abandoned?

Mr. STOUT: Yes, sir.

Mr. EWING: That is all I want to ask him.

The COURT: Is there anything further, Mr. Stout?

Mr. STOUT: Yes, sir.

Redirect examination by Mr. STOUT:

Q. What was your condition April 27th when Mr. Hunt came to the hospital?

A. I was in very bad condition. Suffering.

28 Q. Were you weak?

A. Yes, sir.

Q. What caused the weakness?

A. Pumped saline solution and kept me in hot water bags nearly two days on account of the loss of blood.

Q. Were you suffering at the time Mr. Hunt was there?

A. Yes, sir.

Q. Did you understand at the time you signed the statement anything that was in it?

A. I don't remember anything about it.

Q. You spoke about kicking a car; what did you mean?

A. Give it a sudden start so when it is cut loose it will roll out of the way.

Q. How did you start it?

A. Giving it steam and giving it a start.

Q. You mean starting and stopping the engine suddenly?

A. Yes, sir, putting the brakes on.

Witness excused.

H. A. FURBRASH, the next witness, being first duly sworn testified as follows:

Direct examination by Mr. STOUT:

Q. State your name.
A. H. A. Furbrash.

Mr. EWING: I will ask now, in view of the turn the case took on the matter of the track, may I be allowed to excuse the witnesses on that; I am keeping quite a number from their work.
The COURT: Yes, sir.

Q. Were you, on the 25th of April, 1911, in the employ of the Southern Railway Company in the City of Memphis?
A. Yes, sir.
Q. In what capacity were you employed by the Southern Railway Company?
A. As a car inspector.
Q. Do you recall on that night that Mr. Gadd was injured?
A. Sir?
Q. Do you remember on that night Mr. Gadd was injured?
—. ——.

Q. Do you know what the engine or switch engine of the Southern Railway on which Smith Hunter was engineer and Mr. Gadd was doing——

Mr. EWING: I expect we can save a good deal of time; my information is, and I agree it is the truth, that they were mak-
29 ing up a train to go out on its regular run and that that train, when made up was an interstate train.
The COURT: That the cars being switched by this Company were moving interstate commerce?
Mr. EWING: My admission only went to the fact—your Honor's inquiry——
The COURT: That the cars that they were moving for the purpose of putting into this train, were cars that were carrying freight going to other states.
Mr. EWING: Yes, sir, that is a fact; that they were making up cars in a train which train when made up went out on an interstate journey; that is a fact and there is no use taking up time proving it.
The COURT: Your statement that all the cars that went out in the train were cars loaded with interstate traffic.
Mr. EWING: I don't know as to all of them but for the purpose of litigation, we will let the record show that to be conceded. I am not learned in the interstate commerce law at all, but I do know and have been informed and agree it is the truth that they were making up in the yards a train and that train when made up by the yard crew it was then turned over for transportation to the road crew and went out into interstate commerce. I have a personal opinion that it was interstate commerce after it got started.
The COURT: The legal point you raise is contrary to the——
Mr. EWING: I am not satisfied about that enough; I don't even

claim it was not an interstate transaction. I will say I have no opinion on the subject.

The COURT: All right, proceed Mr. Stout.

Q. Were you on the switch engine that night before the accident to Mr. Gadd?

A. Yes, sir.

Q. How did you happen to get on the engine?

A. I was called up there by Engineer Hunter.

Q. By engineer Smith Hunter?

A. Yes, sir.

Q. What did he want with you?

Mr. EWING: I object to that; I don't know anything about what happened or what Mr. Hunter wanted.

The COURT: How long was this before the accident?

Mr. EWING: If he was there is the one thing material.

The COURT: How long before the accident occurred?

A. The first time about 8 o'clock and the second time as near as I can remember it was along about 10 or 10:15.

The COURT: What time did the accident occur?

30 Mr. STOUT: Somewhere between 10:15 and 10:30.

Mr. EWING: We object to what Mr. Hunter wanted up there; we are not bound by it; I don't think it is material.

The COURT: I cannot tell yet; go ahead.

Q. What did Mr. Hunter want with you?

A. A friend of Mr. Hunter's was on the engine and he called me up to make me acquainted with his friend and he said he wanted me to get him out in the train that night if possible.

Q. What do you mean—to get him out?

Mr. EWING: That is all collateral and we object to it as not material to this lawsuit. What Smith Hunter and this employ- were trying to do with this fellow on the engine, unless it had something to do with this case don't go.

The COURT: It might be competent for the jury as a circumstance tending to show what degree of attention Hunter was giving that night to the operation of the engine.

Mr. EWING: At the time Mr. Hunter and this gentleman were putting up a job on the road this accident didn't take place. If this conversation was going on at that time, I won't object to it at all.

The COURT: I am trying to find out how long it was before the accident.

Mr. STOUT: That was the first time you were on the engine that night?

A. The second time.

Q. Was that person that engineer Hunter introduced to you an employé of the company or not?

A. He was not, no, sir.

Q. While you were on the engine do you remember whether Mr. Hunter gave any direction to Mr. Gadd the fireman?

A. I heard Mr. Hunter tell Mr. Gadd to get down when they stopped and see what the trouble was with the engine.

Q. Were you on the engine when the engine stopped or did you get off before it stopped?

A. I got off just before it stopped.

Q. Just before it stopped?

A. Just before it stopped; it was pretty near standing still when I got off.

Q. Did Mr. Gadd get off after you did?

A. Yes, sir.

Q. What did he do after he got off?

31 Mr. EWING: The defendant moves to exclude the conversation this witness had with Hunter. I don't think it ought to be in the law suit.

The COURT: State your objections.

Mr. EWING: Being that the conversation between this witness and Hunter, prior to the accident and prior to the time this witness had left the engine, throws no possible light upon a matter thereafter transpiring and when they were not conversing when this witness was not on the engine.

The COURT: Did you leave this party on the engine?

A. Yes, sir, he was standing up behind the engineer on the engineer's side.

The COURT: I will overrule the objection. That the conversation passing between the witness and the engineer in itself is not material here, but I will permit him to state it, and state that the man who was introduced to him on the engine was left there by him. In view of the fact that he left the engine just prior to the time this witness did, only for the purpose so far as it might or might not throw light upon the attention or want of attention the engineer was giving his train, by reason of this individual being on the engine.

Mr. EWING: The defendant excepts.

Q. Did Mr. Gadd get down off the engine after you did in obedience to Mr. Hunter's direction?

A. I started to get down on the engineer's side and Gadd started to get down on the fireman's side and Gadd got back up in the cab on the platform of the tender and got down on the engineer's side right after I got off.

Q. Did he have his torch with him?

A. He had his torch and it was lighted.

Q. What did Mr. Gadd do after he got down on the ground?

A. He got down and started towards the head of the engine and of the engine and I didn't see what he done.

Q. Did you or not see Mr. Gadd when he was——

Mr. EWING: Let him tell what he saw.

The COURT: He has put the question in the alternative.

Q. Did you or not see Mr. Gadd on the ground looking under the engine on the engineer's side?

A. He got down and started towards the head of the engine and he was very near the front of the engine—he was at the head of the engine when I looked back, standing with one hand on the engine and the other hand he had his torch.

Q. Was the engine standing still at that time?

32 A. Standing still at that time.

Q. You saw him clearly?

A. I seen him clearly.

Q. Do you recall what the engine did after that?

A. At that time I was about two car lengths from the engine and had started to cross the track and the engineer started to kick a car and did kick the car, which I got out of the way of it, and what called my attention to get out of the way of it, was that the engine was making such a fuss, and I looked back and saw the car coming and I got off the track out of its way.

Q. Did the engine have one car or more?

A. As well as I remember, it had one car; that was the car it was kicking.

Q. How long after that did you learn of Gadd's injury?

A. It was just a few seconds.

Q. After that, did you hear of it after the car was kicked?

A. Yes, sir, just a few seconds.

Q. What do you mean by kicking a car?

A. A sudden start—start just as fast as possible and stop as quick as possible and let the car go ahead.

Q. The engine and car both start as suddenly and quickly as possible and as fast as they can, then the engine stops and the car uncoupled, rolls on?

A. The car is cut loose from the engine and the engine stops as quickly as possible.

Q. Did you see Mr. Gadd there—do you know whether the engine backed up or not, or did you pay any attention to that?

A. I really did not pay any attention to it whether it backed up, or stood still.

Q. You didn't pay any attention?

A. No, sir, for I was watching the car.

Q. Just after you heard the noise made by the engine starting up suddenly, you got out of the way of the car; just after that you heard of Gadd's injury?

A. Just a few seconds after that.

The COURT: Had the engine made another movement after kicking the car?

A. I don't remember whether it made a movement after that or not.

The COURT: Was there another car to the engine after kicking this car from it?

A. No, sir, nothing but the engine.

Q. After you heard of the accident what did you do?

33 A. I ran up there; I was about two car lengths from the engine—may be 2½ and I ran up there and found Mr.

Gadd's head—this young man on the engine had Mr. Gadd's head in his lap.

Q. The friend of Hunter's?

A. The friend of Hunter's.

Q. He was down on the ground?

A. He was down on the ground with Gadd's head in his lap. I took off my jumper——

The COURT: That was on the east side of the track?

A. Yes, sir.

Q. The engine was north?

A. Yes, sir.

Q. Do you know what became of Mr. Gadd?

A. Yes, sir.

Q. What was done with him?

A. When I got up there I stood there a few minutes and the foreman of the switch engine went and telephoned for the ambulance.

Q. He was taken to the hospital?

A. Yes, sir.

Q. What injury did he sustain?

Mr. EWING: There is no dispute as to the injury.

The COURT: There is no dispute as to the injury.

Q. At the time you last saw Mr. Gadd before the injury, he was on the right hand side of the engine on the engineer's side and had his torch?

A. Yes, sir, on the ground.

Q. The engine was standing still at the time?

A. Yes, sir.

Cross-examination by Mr. EWING:

Q. What is your business?

A. With the Clover Farm Daily at present.

Q. What was your business at this time?

A. Car Inspector for the Southern Railway.

Q. You were conscious of the fact that when Mr. Hunter this engineer, had a stranger upon that engine, he was violating one of the rules of the company?

A. As far as violating of the rules, I don't know anything about the rules about strangers on the engine.

Q. You were on the engine with Gadd, Hunter and this stranger?

A. Yes, sir.

Q. Where was the engine with respect to Monroe Street Bridge when the conversation took place you have told about?

34 A. It was between the bridges and Monroe and Madison Streets.

Q. How long before the accident to Gadd?

A. When I first got on the engine, I would say it was about thirty minutes.

Q. You had left the engine before Mr. Gadd was hurt?

A. Yes, sir.

Q. You left the other man still on the engine?
A. Yes, sir.
Q. And you know nothing about the circumstances of your own knowledge; I mean the circumstances attending Gadd's getting a leg cut off. You never saw him when he undertook to get on the engine did you?
A. No, sir, I did not.
Q. Did you see him when he was thrown under the train—jerked under?
A. No, sir.
Q. Or slipped under?
A. No, sir, I saw the torch when it went out.
Q. Was that before or after this car had been kicked?
A. The car was rolling just past me.
Q. I am to infer from that it was after it had been kicked?
A. It was at the time the car was rolling after it was cut loose.
Q. How far from you was the car at the time you first saw it?
A. I didn't catch that.
Q. How far was this car that had been kicked from you when you first saw it?
A. Right behind me.
Q. The engine was how far back?
A. The engine was about may be a car or a car length and a half.
Q. 75 or 80 feet?
A. Just about.
Q. And you went back there and found Mr. Gadd?
A. Yes, sir.

Mr. EWING: That is all.
The COURT: Let me ask the witness a question. After the noise you refer to that the engine made at the time you say they kicked the car,—how long after that noise was it before you saw this torch go out?
A. Just a few seconds.
The COURT: Just a few seconds?
A. Yes, sir.
35 Mr. EWING: I want to ask Mr. Gadd—I don't know whether I followed him exactly—I want to be perfectly clear; was this engine moving when you had hold of it?
Mr. GADD: No, sir. Right at the time I took hold of it just as I was in the act of taking hold of it.
The COURT: Just as you seized the hand hold it moved?
Mr. GADD: Yes, sir.
The COURT: When he reached the hand hold it was not moving; just as he grasped it, it jerked and threw him under the car.

Witness excused.

Mr. STOUT: I had Mr. Rice, who is an employé of the Southern railway subpœnaed to show that it was an interstate train but as that is admitted it will take up time putting him on the stand.
The COURT: It is admitted that the train carried interstate traffic.

Mr. STOUT: And that the train was an interstate train. That is our case, your Honor.

Mr. EWING: The facts admitted are already in the records.

Thereupon the Defendant presented the following testimony.

SMITH HUNTER, the first witness, being duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. State your name?

A. Smith Hunter.

Q. You are an engineer of the Southern Railway?

A. Yes, sir.

Q. You were in charge of the engine when Gadd was hurt?

A. Yes, sir.

Q. Had Mr. Gadd gotton down off the engine some place to examine to see what some sparks was or some friction?

A. Yes, sir.

Q. Had he gotton back on the engine?

A. Yes, sir, came back up on the engine.

Q. After he got off for that purpose he had gotten back in the cab?

A. Yes, sir.

Q. Who was on the engine with you when you went from Monroe Street on up?

A. When we went up after the cars?

36 Q. Yes, sir?

A. I don't remember, Mr. Ewing; I cannot say for certain whether anybody; if there was it must have been some of the crew; maybe the foreman.

Q. Was anybody on there, a friend of yours that did not work for the railroad?

A. Not that I remember.

Q. When you went up to the yards where Gadd was hurt, what was the circumstances—just state to the jury what you know about it.

A. Well in completing the freight train going out of the yard—No. 74—there is a track we call the house track. I always pull those tracks, and if we have not got enough we go to Vance Street and work along the track and generally get enough to finish the tonnage out for the train, and we went up and got maybe 14 or 15 cars and come down, and as we come down the hill we noticed this fire on the left side where there was some friction, and when we got down in the yard, I told Gadd to take his torch and see what it is; maybe there is something broke. So he got down and looked on that side and came back up in the cab and told me all that he could see.

Q. Told you that was all that he could see when he got back in the cab?

A. Yes, sir.

Q. Go ahead.

A. I was busy cutting the train in, fixing the train up, making

a few short switches, and the next time I noticed Gadd he was down on the ground and hollering to come there quick.

Q. The next time you saw him he was on the ground hollering to come there quick?

A. Yes, sir.

Q. Did you go there to him?

A. Yes, sir.

Q. Did you find him with his leg mangled?

A. Yes, sir, his foot.

Q. What did he say as to how he came to be there?

A. I asked him—I said, Mr. Gadd, how in the world did you do this? He said, I went to catch the engine and missed the step, he said.

Q. Do you know whether he was on the ground after he had gotten back in your cab from looking at this friction—did you know he was on the ground any time after that until you heard him holler?

A. No, sir, I never paid any attention to him; I was busy watching the switchmen.

37 Q. In making up the train and pulling about there, where did you sit—which way did you look?

A. As a general thing we used that night engine headed north, and of course in handling the cars and the switching looking north and our whole attention is practically on those men.

Q. Are you looking outside or leaning outside the engine?

A. Yes sir, outside.

Q. You have to sit with your head outside to see what is going on?

A. Yes, sir. Of course if they are right up on you look outside.

Q. Did you see Mr. Gadd in the act of taking hold of the engine while still, then did you apply the sudden power and throw him?

A. No, sir, I didn't throw him.

Cross-examination by Mr. STOUT:

Q. How old are you?

A. 32.

Q. Where do you live?

A. 548 Madison.

Q. You were employed as switch engineer in the yards of the Southern Railway on April 25, 1911?

A. Yes, sir.

Q. Who was the for-man in charge of the switch crew?

A. Walter Mergan I believe his name is.

Q. Who was the switchman? Were they white or colored men?

A. White men.

Q. Who were the switchmen?

A. The best I recollect is George Gary, Willie Cole and Jim Strickland.

Q. You are still in the employment of the Southern Railway?

A. Yes, sir.

Q. What was the first thing you did that night after going to work?

The COURT: What is the purpose of that?

Mr. STOUT: I have a signed statement here and want to cross-examine him.

The COURT: It could not be used to impeach him with. There is no complaint before 7 o'clock.

Q. You went up to the K. C. Junction and came down with the cars didn't you?

38 A. I don't remember now whether we went plumb to the K. C. Junction or not. I know we went up as far as the track at Vance Street.

Q. When you came back into the yard you had a cut of cars?

A. Yes, sir.

Q. Do you remember how many cars you had?

A. No sir, but I judge 14 or maybe 15 cars, along there somewhere.

Q. As you were coming down there at Vance Street did Fireman Gadd tell you that there was a stream of sparks falling from the front driving wheel?

A. Yes, sir.

Q. And you told him it must be a spring hanger broken?

A. Something like that, yes sir.

Q. After getting to Union Street you told him to take his torch and step down and see if there was anything broken?

A. Yes, sir.

Q. After you had passed from Union Street you made one or two switches in cutting up the *the* cut of cars.

A. Before finishing the train, yes sir.

Q. And it was while you were making one of these switches that he got down off of the engine was it not?

A. I recollect that there was one bunch that we cut off and I think that is about the time that he looked at it and come back up and told me that was all that he could find.

Q. But you shoved into one of these tracks down there—you were switching these cars into different tracks?

A. Yes, sir, finishing up the train.

Q. Is it not a fact when you were switching those cars you saw Fireman Gadd on the foot board of the engine, that is on the front of the engine.

A. No, sir, I don't think I seen him on the footboard the best I recollect. I didn't see him——

Q. Is it not a fact you saw him there—think about it?

A. I think if I did it slipped my mind.

Q. You don't remember anything about it?

A. It slipped my memory if I seen him there.

Q. And after that you backed over the switch—you got a signal from one of the switchmen to kick a car?

A. Yes, sir.

Q. And you obeyed the signal?

A. Sure.

Q. You kicked the car?

A. Yes, sir.

39 Q. And you saw fireman Gadd get off the front of the engine and walk back towards the steps?

A. If I did, I don't remember.

Q. You do not recollect anything about it at all?

A. Not now, it has been quite a while ago.

Q. After you had kicked the car in obedience to this signal and had stopped, or about that time, you heard about Mr. Gadd, is not that a fact?

A. Yes sir, about the time I stopped Mr. Gadd then said——

Q. Don't you know when he got hurt?

A. The first thing I knew about it was he was down there calling me to come to him.

Q. And you paid no attention to him, after you saw him down there; you had forgotten all about it?

A. At the front end I say.

Q. When you saw him walking towards the side of the engine you forgot all about him.

A. I would not say about that now.

Q. When you kicked the car that was the first you heard of Mr. Gadd being hurt?

A. Calling me to come to him.

Q. Don't you know how he got hurt?

A No, sir.

Q. Is it not a fact there was some one on the engine with you at that time?

A. As I said before, if there was I don't recollect it.

Q. Do you know a man name- Furbrash who was a car inspector?

A. Yes, sir.

Q. Was he on the engine that night?

A. Furbrash? Mr. Furbrash worked down in the yards off and on and was on the engine several times, night after night, he was a car inspector; he has been up on the engine but whether that night I could not say.

Q. Do you remember anything about it?

A. No sir; that one night; because it is the custom——

Q. Don't you recollect while this man was on the engine and you told Furbrash to try to get him out—is it not a fact you did that—this friend of yours?

A. It strikes me that Mr. Furbrash came up from the cut of the cars.

Q. I am asking you about the other. Didn't you try to get him to take him out?

A. He was sitting out beside the engine.

Q. Who?

A. Mr. Gadd.

40 Q. I am speaking about Furbrash.

The COURT: Mr. Stout he just stated he didn't remember anybody being on the engine.

Q. Is it not a fact you called Furbrash up on the engine that night?

A. As I told you, he worked there in the yard; I cannot say about that one night; he worked there in the yard.

Q. You don't remember anything about it?

A. Not calling him up on the engine.

Q. How is it you remember so well about Gadd getting back up on the engine?

A. Because I was interested in knowing what was broke about the engine; that was my part.

Q. But you have forgotten all about everything else that happened except that?

A. I wasn't interested in it because as a general thing the fireman is up and down on the ground often; you would not pay him no mind; you would be busy at work.

Q. Is it not a fact that when an employé is engaged in doing work around the engine and you get a signal to move the engine either forward or backwards, as the case may be, and you knew that by doing that the life of this employé who was about the engine, would be in danger, is there not a rule prohibiting you moving the engine in obedience to the signal?

A. Until he gives you some signal or let you know that you should move.

Q. But you are required to keep the engine there and not answer the other signal?

A. Suppose to tap the bell or toot the whistle to notify him.

Q. You are not supposed to move the engine ahead unless you give the man notice?

A. No sir, something to that effect.

Mr. STOUT: I want to introduce Rule 402 or that portion of it,—I don't know—unless Mr. Ewing——

Mr. EWING: I will say if what he said was the rule is not, it ought to be. I will agree it ought to be and is. I think your Honor will make a rule if they have not one like that.

Redirect examination by Mr. EWING:

Q. Mr. Hunter, you mentioned the switchmen; were there any switchmen about this engine at the time of this accident?

A. No, sir.

Q. They were down where the train was?

A. Yes sir, anywhere from four to six cars from us.

41 Q. This was a dark night?

A. Yes sir, had to have the light burning.

Q. Did Mr. Gadd have a lighted torch in his hand?

A. Yes, sir.

Q. And you paid no attention to him from the time he had gotten up in the cab and reported what it was causing the friction?

A. No, sir.

Q. If Furbrash was on there it was so natural and usual you paid no attention to it?

A. That is it.

Mr. STOUT: At the time of this accident to Mr. Gadd, there was nobody around there that you know of except Gadd and yourself?

A. That is all.

Witness excused.

S. W. HUNT, the next witness, being duly sworn testified as follows:

Direct examination by Mr. EWING:

Q. You are Claim Agent for the Southern Railway?
A. Yes, sir.
Q. On the 27th. day of May 1911 did you call on Mr. Gadd at the hospital?
A. The 27th. of April.
Q. For what purpose did you call on him?
A. To secure a statement from him as to his accident, to tell how it occurred.
Q. To get a statement of the circumstances under which he was hurt?
A. Yes, sir.
Q. Did he make a statement?
A. Yes sir, he did.
Q. What was his mental condition at that time?
A. Seemed to be normal.
Q. Was there anybody in the room with him.
A. A young lady with him, introduced to me as his stepdaughter.
Q. Did ou have a social conversation with Gadd.
A. Yes sir, talked with him some few minutes before I asked for the details of the statement.
Q. Did you talk about other matters than this accident?
A. There was a young man with me, Mr. Snider, and Mr. — remarked that was the room Mr. Coe was in when out there and Mr. Gadd asked about Mr. Coe, asked what he was doing.
Q. Where is Snider?
42 A. I don't know, he is gone home, in Virginia.
Q. Did Mr. Gadd give you a statement of how it took place?
A. Yes, sir.
Q. Did you write it down as he gave it?
A. As near as I could in his exact language.
Q. Is this the statement?
A. Yes, sir.
Q. Did you read it over to him?
A. Yes sir, I told him I want to read it over and I want you to correct it as I go along.
Q. Did you read it?
A. Yes, sir.
Q. Did he sign it?

A. Yes, sir.
Q. Did you have any interest in getting him to sign it?
A. None whatever.

Cross-examination by Mr. STOUT:

Q. What time of day or night did you get there?
A. As near as I remember about 3 or 4 o'clock in the afternoon.
Q. You knew Mr. Gadd had received this injury the night before?
A. Forty-eight hours before.
Q. Forty-eight hours before. Forty-eight hours had not elapsed when you went there to get the statement?
A. Yes, sir.
Q. He was laying in bed flat of his back?
A. Propped up.
Q. He was very weak on account of the loss of blood?
A. He naturally would be some weak.
Q. He was not at himself?
A. Yes sir, I would judge him to be normal; the reason I took the statement I had a conversation with him before.
Q. How did it happen you went around so quick; why not give him an opportunity?

Mr. EWING: To do what?
The COURT: Would you say a man was in a normal condition who less than forty-eight hours before had a leg amputated?

A. So far as his intelligence was concerned he seemed to be at himself. He was normal; he didn't seem to be suffering at the time.
Q. You don't know whether or not he was under the influence of an opiate at the time?
A. No, sir.
43 Q. He may have been under it and you not know it?
A. So far as I judge, he was not.
Q. Wouldn't you think a person who had a leg cut off by being run over not forty-eight hours before would be in some pain unless he had an opiate?
A. Of course there would be more or less suffering I suppose.
Q. You say he did not appear to be suffering?
A. I asked him, how are you feeling, and he said, pretty well. I asked the house physician if he was in condition to talk and also the nurse.
Q. And your opinion is a person not under an opiate, would not be suffering pain within 48 hours after an accident like the one Mr. Gadd had sustained?
A. I would not think he was feeling the best in the world.
JUROR: I did not get the answer.
Mr. EWING: He said he would not be feeling the best in the world.
JUROR: Please talk louder.
Q. You go around after every accident and get a statement from the injured party; that is your duty?
A. Most of them?

Q. You usually have a pretty good idea how an accident happened before you go there?

Mr. EWING: I object to that.

The COURT: I don't know what his opinion would be as to other accidents.

Mr. STOUT: I am speaking—I mean he had a pretty good idea about this accident before he went there?

A. A general idea.

Q. It is not a fact that whenever you go around to see persons especially one in the condition of Mr. Gadd, you frame the questions to be answered yes or no?

A. Well no, I try to put down the statement just as he details it.

Q. Instead of doing that and getting a particular answer yes or no, you make him go all over it, is not that a fact?

A. I let him give the details as he understand- it.

Q. You do not, for instance, frame two sentences so the form of the question to be answered yes or no, and propound it to the witness?

A. I don't exactly understand your question.

Mr. EWING: I am going to object to the question—what Mr. Gaad said—that is the only case we are investigating.

The COURT: Yes, sir.

44 Mr. STOUT: Stand aside Mr. Hunt.

Witness excused.

Mr. EWING: Your Honor sees the narrow compass in which the case has been brought and I want to say to the Court it was in the nature of a very great surprise to me with respect to Mr. Gadd's statement of his mental condition at the time of this statement; this necessitated our sending out to get the physician who was present.

The COURT: Dr. Thornton?

Mr. EWING: Yes, sir.

The COURT: He is here.

Dr. G. B. THORNTON, the next witness, being duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. You are the surgeon or was the surgeon of the Southern Railway?

A. I am.

Q. How long have you practiced medicine?

A. Since 1860.

Q. Do you remember in April 1911 an injury to Mr. Gadd which resulted in the amputation of his leg?

A. Yes sir, I saw him after the operation.

Q. How long after the operation?

A. Within 24 hours I think I saw him.

Q. How did Mr. Gadd stand the operation—how did he come from the influence of the anesthetic?

A. Very well; when I saw he was rational and entirely at himself.

Q. Forty-eight hours after the accident; were you still attending him?

A. Yes sir, I made a visit.

Q. At the time was he or not in perfectly good condition to make a statement how the accident happened?

A. I don't remember whether I took a statement or not; I can tell by referring to my book and seeing a report; but he was well able to make a statement; I think Dr. Rudisill took the first statement is my recollection now. I saw him first after he was operated on in the hospital.

Q. Forty-eight hours after, he signed a statement made to Mr. Hunt, and I want to know from you, if, 48 hours after the injury, at that time, in your opinion, he was entirely capable of stating how everything happened?

A. Most assuredly he was in my opinion.

Cross-examination by Mr. STOUT:

Q. When did you see him?

45 A. I don't recall just now the exact date but I think it was the day he was operated on.

Q. Do you remember whether you saw him on the 27th. day of April, 1911, Doctor?

A. What is that?

Q. Do you remember whether you saw Mr. Gadd on the 27th. day of April, 1911?

A. Yes sir, I saw him.

Q. Do you think or do you know whether he was under the influence of opiates?

A. No sir, he was not——

Q. Was he suffering any pain?

A. Not that I recall now; no pain as I recall now at that time.

Q. You don't remember whether he was suffering any pain on that day or not?

A. No sir, he was not; I saw him after the operation and he complained of no pain then.

Q. Wasn't he very weak?

A. No sir, he was in very good condition.

Q. He had not lost any blood?

A. He had lost blood, yes, sir.

Q. That didn't weaken him?

A. He was weakened some of course, but not materially. He could make a statement, and his pulsation was about as fast as is usual in all such cases.

Q. You don't remember how long before or after 3 o'clock on the 27th. of April you saw him, do you?

A. No sir, I do not.

Q. You do not?

A. No, sir.

Q. You don't remember whether it was four hours before or four after.

A. After what?

Q. After 3 o'clock April 27th.

A. My recollection is now that I saw him in the forenoon before 3 o'clock; I could tell better if I looked at my book and saw the notation I made.

Q. You were in the employ of the Southern Railway at that time were you?

A. Yes, sir.

Mr. STOUT: Stand aside.

Witness excused.

Mr. EWING: I will ask the Court's indulgence until 2 o'clock for the purpose of getting another physician here and meeting the suggestions of the plaintiff against which I had not the -lightest *m*otion it was necessary to provide.

46 The COURT: Who do you want to bring?

Mr. EWING: Dr. Rudisill and possibly another person at the hospital who knew his condition at that hour; I would like to have them here.

The COURT: We will adjourn until half past one o'clock, that will give you an hour and a half.

Mr. EWING: The trouble is about getting the witnesses.

The COURT: I don't know about that; I will give you an hour and a half to get the witnesses.

Mr. EWING: Dr. Rudisill lives way out.

The COURT: We will adjourn until half past one o'clock.

At 1.30 P. M. Court convened, and the following proceeding- were had:

Dr. A. W. RUDISILL, the next witness, being duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. State your name?

A. A. W. Rudisill.

Q. You are a physician?

A. Yes, sir.

Q. Where you at the hospital when W. O. Gadd was brought in or shortly thereafter?

A. I think he had already arrived at the hospital when I got there.

Q. Had his foot been cut off?

A. Practically so.

Q. You were there at the operation?

A. I performed the operation.

Q. From that time on were you in touch with Mr. Gadd?

A. Yes sir, I saw him daily while confined at the hospital.

Q. He was hurt on the 25th. day of April or on the night of the 25th. day of April; did you see him on the 27th?

A. Yes, sir.

Q. Just state to the jury whether he was in possession of his mental faculties.

A. Yes sir, entirely so.

Q. Do you know any reason why, or is there any reason why a person, however great may be his pain or the extent of the operation may be, if he is conscious why he cannot intelligently state the circumstances attending the injury?

A. In this case there was none; he was not shocked very considerably, that is, not enough to dull his sensibilities or in-
47 tellect at all; he had not lost any great amount of blood; his leg was crushed off, there was unusually little shock.

Q. Was he at any time unconscious except when under the influence of the anesthetic?

A. No, sir.

Cross-examination by Mr. STOUT:

Q. You are employed by the Southern Railway?

A. Yes, sir.

Q. On their payroll?

A. Yes, sir.

Q. What time did you perform this operation?

A. Sometime near midnight.

Q. On the night or morning of the 26th.—night of the 25th. or morning of the 26th. of April? He was injured about 10:30 of the 25th?

A. Yes, sir.

Q. So that would make it sometime about 12 o'clock on the morning of the 26th?

A. Yes, sir.

Q. Is it customary or not after a person has recovered from the shock to administer opiates to allay the pain?

A. Is it customary after shock—repeat the question please.

Q. Is it customary or not after a person has recovered from the shock of the operation to administer opiates?

A. If the pain is pretty great we give opiates?

Q. Had any been administered to Gadd?

A. I don't recall as to that.

Q. You don't remember ?

A. No, sir.

Q. He may have been under the influence of opiates or he may not.

A. Yes, sir.

Q. What time on April 27th. did you see him?

A. I think I saw him in the morning and in the afternoon too.

Redirect examination by Mr. EWING:

Q. Was he under the influence of an opiate on the 27th?

Mr. STOUT: He said he didn't know.
Mr. EWING: He said he didn't know after the injury.
Mr. STOUT: That is what I asked him.

Q. I ask you now was he under the influence of opiates on the 27th?
A. As I remember, he was not.
Q. Did you talk to him?
A. Yes, sir.
48 Q. Did he understand?
A. Yes sir, answered intelligently, yes, sir.

Recross-examination by Mr. STOUT:

Q. Hadn't Mr. Gadd bled considerably?
A. No sir, there didn't seem to have been a very great amount of hemorrhage,—didn't seem to be at the hospital; I saw him after he reached the hospital; there was not any great amount of blood there.
Q. Don't you know how much he bled before he reached the hospital?
A. Judging from his condition I didn't think that he had lost a great deal of blood.
Q. You administered solutions of saline solutions into his arm?
A. We generally do that in these injuries; it is almost a universal practice.
Q. When they lose a great deal of blood?
A. No, sir, where a leg is to be amputated. It is very good practice whether the leg is sacrificed or not. It is customary to administer saline solution before the operation or simultaneously while the operation is going on.
Q. You stated a while ago you didn't remember whether he was under the influence of an opiate on the 27th. or not.
A. No sir. I would not say as to the 27th.
Q. You don't know,—it has been so long and you have so many of these cases you don't remember, is not that a fact?
A. I remember the second visit—the evening visit.
Q. I say, those things you don't remember; there is nothing to call your attention to it at this late date?
A. No sir, except just recalling the incident, the particular circumstances.
Q. Do you remember what the circumstances were as to his being under the influence of an opiate on the 27th?
A. I don't recall whether there was a great deal of pain or occasion for it.
Q. Do you recall whether or not he was under the influence of an opiate on the 27th?
A. In the afternoon, say from 5 o'clock he was not under the influence.

Q. You don't remember his condition, whether he was under the influence of an opiate at 3 o'clock or not?
A. Before 3 o'clock, possibly 5.
Q. Wasn't Mr. Gadd kept in hot water bags a good many hours after the accident?
49 A. Yes, sir, the hot water bags to the extremities and about the body after the operation.
Q. What is the purpose of that.
A. To prevent shock and keep the skin warm.

Mr. STOUT: Stand aside.
Mr. EWING: That is all your Honor.

Witness excused.

The COURT: I- there anything further?
Mr. STOUT: I have further witnesses if your Honor will indulge me a few minutes.
The COURT: Witnesses in chief?
Mr. STOUT: No sir, in rebuttal.

B. J. BRIEN, the next witness, being duly sworn, testified, as follows:

Direct examination by Mr. STOUT:

Q. State your name
A. B. J. Brien.
Q. What is your business?
A. House detective at the Peabody Hotel.
Q. Do you know Mr. W. O. Gadd?
A. Been knowing him two years.
Q. Do you know his reputation for truthfulness and veracity?

Mr. EWING: Wait a minute; that is objected to; it is not assailed in the slightest degree.
The COURT: Yes, sir. I don't think it is competent or material. His reputation is not assailed in any way.
Mr. STOUT: He has tried to impeach him by——
The COURT: I don't understand you can introduce a witness unless his reputation has been assailed. No sir, I don't think it is competent.
Mr. STOUT: All right. Note our exceptions. I have three or four more witnesses that would testify to that, the point I want to prove by this witness.
Mr. EWING: Of course we make the same objection.
The COURT: The ruling will be the same. I understand the rule to be where there is only a conflict of facts between witnesses, that it is not competent to undertake to support the character or reputation about one of them where it has not been assailed. The presumption is that he is a man of good character and testified to the truth.
Mr. EWING: Yes sir, it is the jury's duty to reconcile and weigh the facts. But their reputation cannot be used to bolster any men.
The COURT: Where the testimony of a witness is of such character

as it would go to the moral turpitude of another witness then
50 you might introduce evidence as to his good character.

Mr. EWING: That is the rule as I understand it, involves the moral turpitude.

Witness excused.

This was all the testimony offered in the case. The defendant moved the Court for a peremptory instruction in its favor and the Court reserved a ruling thereon until after argument and thereafter overruled same and defendant excepted.

Counsel then proceeded to address the jury, and during the closing argument for the Plaintiff, Mr. Stout made a motion to amend the declaration, when the following proceedings were had:

The COURT: As I understand your motion is to strike out the words——

Mr. STOUT: What I want to do is to let the declaration conform to the facts.

The COURT: State what you want; I don't care about conforming to the facts.

Mr. STOUT: I move to amend declaration's first count by striking out of the declaration the words, "Said engineer started his engine and was moving slowly forward whereupon plaintiff caught hold of handholds provided for that purpose on the cab of the locomotive and on engineer's side had stepped upon one of the steps leading to the cab," and to insert in lieu thereof: "Without direction from the plaintiff and while the engine was standing still, and just as the plaintiff attempted to board the engine on the engineer's side and had caught hold of the handholds provided for that purpose on the cab on engineer's side and was in the act of stepping on the steps leading to the cab on engineer's side when the engineer suddenly started" and just let that follow the other, that it all.

The COURT: You want to strike out the words, "Said engineer started the engine and was slowly moving forward"—strike that out and "When the plaintiff caught hold of the handholds provided," etc.

Mr. STOUT: Yes, sir. The Court knows that the statements of a declaration are the lawyer's statements.

The COURT: Let the amendment be made and you reserve your exceptions to it.

Mr. EWING: Yes, sir. I am going to object to any statement that would indicate or convey to the jury at all that the statement
51 which was by leave of the Court altered is not plaintiff's or that he is not bound by it.

The COURT: Whether bound by it or not, the amended declaration is here now before the Court and Jury and if it became necessary I should not hesitate to say to the jury the pleadings are prepared by counsel and if he cho-ses, may state his case in a different form or counts to the jury, and the other hand, a man may plead as many

pleas as he pleases. The purpose of the pleading is to make an issue. That is all. Now go ahead.

Mr. EWING: Note our exceptions.

Charge of Court.

GENTLEMEN OF THE JURY: This is a case in which W. O. Gadd sues the Southern Railroad Company for twenty-five thousand dollars as damages for wrongfully and negligently injuring him in its yards in the City of Memphis, while he was in its employ and on duty as a fireman on a switch-engine. The act of carelessness and negligence that is alleged is that the engineer recklessly and negligently applied the steam to the engine with such suddenness and force as to throw the plaintiff beneath the locomotive with the result that the wheels of the locomotive passed over his left leg, necessitating an amputation thereof, just below the knee.

The defendant has entered four pleas. First, that it is not guilty of the things alleged against it; second, that the injury to plaintiff was due to and caused by his own lack of ordinary care; third, that the plaintiff assumed the risk incident to the operating and moving of said engines in the ordinary course of business; fourth, that he cannot recover because the injury was inflicted by the negligence of a fellow servant.

If you believe the evidence introduced by the plaintiff to be true as to the manner in which he was injured, and if you believe that the conduct which that evidence discloses on the part of the engineer in charge of the engine was negligence, then the defendant is liable to the plaintiff for his injuries, and unless the plaintiff was guilty of contributory negligence, he is entitled to recover whatever amount, under the sum for which he has sued, that, in your judgement, would reasonably compensate him for the injury which he sustained.

If you do not believe the evidence of the plaintiff as to how this accident occured, or if you do believe what he said, but do not believe that the acts of the engineer which he describes were
52 negligence which caused the injury, then you should find for the defendant.

So, if you find that the company was liable to him, your next inquiry should be was the plaintiff himself guilty of any acts which contributed proximately to his injury. If you find that he was, then the negligence upon his part would go in reduction of the damages to which he might be otherwise entitled in the proportion which his negligence bears to the negligence of the Railroad Company. That is to say, if his negligence was great and the railroad company's negligence was slight, why your verdict should be correspondingly lower than what it would be if he was guilty of negligence; or if the negligence on the part of the defendant was about the same as plaintiff's, then the amount of your verdict should be correspondingly lower.

But you understand what I mean when I say if you find the defendant liable to the plaintiff by reason of its negligence, then you

should give him whatever in your judgment would reasonably compensate him. If you find he was guilty of negligence which proximately contributed to his injury, then that amount must be reduced in the proportion that his negligence bears to that of the company.

Now, in determining whether or not you will believe the evidence of the plaintiff to be true: As I recall it, and if I am wrong, you will remember the testimony, the only evidence that is introduced here that denies the plaintiff's statement of how this accident occurred, is a written statement which he made within forty-eight hours after he was injured, and which he says he signed. That is important in determining what weight you will give to his testimony here. If you believe he made that statement, in so far as it conflicts on material matters with what he states here, it would be material for your consideration in determining what weight you will give his statement now. But, primarily, upon that question, you should first determine what weight that written statement which is introduced here would be given by you, and for that purpose, you will take into consideration the conditions under which it was made, the time it was made in relation to the accident. The condition of the plaintiff, physicially and mentally when it was made; whether or not he was in such condition as to have intelligently made a statement of that character about his accident; whether he made it under the pressure of the claim agent of the defendant company,—

53 and I use the word "pressure" not in the sense that he forced him to make it, but the fact he was there asking him to make a statement, and as he says, whether or not he signed the paper that was prepared for the purpose of getting rid of it. What was the state of his mind under all the facts and circumstances with-forty-eight hours after he had been run over by a locomotive engine, his leg cut off, after suffering the loss of blood and corresponding weakness, the pain and suffering that was caused by the accident under the proof, and then say for yourselves whether or not you believe his mind was in such condition at the time this claim agent called on him to have made an intelligent statement or to have understood any statement that was made. He says he doesn't remember what was in the paper. Upon the other hand, proof is introduced here through the claim agent, I believe, who says that he thought plaintiff was in a normal condition and he wrote the statement down as the plaintiff made it and read it over to him and he signed it. The doctors said that before that time, in the morning and on the same day he made the statement in the afternoon, they thought he was capable of making a statement of this character. Now, that goes to you for the purpose of determining what weight you shall give this statement which is introduced here as a statement made by him, and then if you believe he made it understandingly, and was in condition to know what he was doing, then it is important in determining what weight you will give his testimony on the stand upon any material matters about which the two statements might conflict. If you do not think he was in a proper state of mind to have made an intelligent and understanding statement, why then

you will give it that class of weight. And if you believe he did make it, and that it is entitled to weight sufficient to destroy what he shall say here today how that accident occur-ed, why then give it that weight. That is all for you to determine. Of course the statements of the doctors made here as to what his condition of mind was is made as physicians, as experts, and is their opinion. And so of the statement made by Mr. Hunter that his condition was normal, is an opinion of the witness about that matter, and goes to you as a circumstance for whatever it may be worth. The statement made by the plaintiff as to what he remembered and understood in his condition that day is a statement made by an individual, who would possibly better understand his condition, so far as being able to understand and remember what occured than anyone else, but if he is faking about that,—if you believe he is, why then give his testimony weight accordingly.

54 So that if you find after all this evidence has been considered by you, as I said in the beginning, and you believe that the testimony introduced here by the plaintiff touching the manner of this accident, and you believe that the conduct of the engineer in starting the train in that manner was negligence, then you will find for the plaintiff, and whatever you might allow him if he was guilty of no negligence would be correspondingly reduced, or proportionately reduced, if you find he was guilty of negligence that proximately contributed to his own injury.

In weighing the testimony of each witness, you will take into consideration his appearance upon the witness stand; the opportunity he had to know the facts about which he testified; the reasonableness of his story; whether or not he is related to the parties interested in the law-suit; whether he is an employé of either one of the parties; and then determine what weight you will give to his testimony—whether or not he was a witness who remembered and understood about the matters about which he undertook to testify, and went along and testified, or whether he halted, remembering some things and failing to remember others about important matters or transactions,—then determine what weight you will give to each witness' testimony. Now, the fact that a man is a party to a lawsuit does not warrant you in disbelieving what he says, unless you believe that the fact of his interest in the case has warped him from the truth. Has the interest he has caused him to testify falsely in order to carry his point, regardless of what the rights of the parties are. Upon the other hand, the fact that the witnesses here are employés of the defendant, should not warrant you in disregarding their testimony, unless you believe they were influenced by the fact of their employment in such a way as to warp them from telling the truth. Did it make them exaggerate, or hold back or prevaricate. If it did not, then they are witnesses just like other witnesses in the case. If it did, then you will give their testimony such weight as you think it entitled under such circumstances.

If you find for the plaintiff, your next consideration would be, what amount is he entitled to in case he was guilty of negligence

himself? Now, in determining that question, you will take into consideration the earning capacity of the plaintiff,—what he is able to earn; his health; the amount of his suffering and pain; the loss of a limb; his condition now; whether or not this will heal; or whether it is reasonable to infer there will be suffering from it in the future, and then sum it up and say what gross sum would
55 reasonably compensate him. If you determine that, and you find that he was guilty of contributory negligence, then determine from the evidence in what proportion that negligence contributed to his injury, and reduce the amount he would otherwise be entitled to in that proportion.

If you find for the defendant, you just say, "We find in favor of the defendant." If you find for the plaintiff, you say, "We find for the plaintiff, and assess his damages at—," whatever you may find, on the blank for of the verdict which I hand you.

Special Requests and Exceptions to Charges.

The COURT: Is there anything further, Mr. Stout?

Mr. STOUT: Yes,—just a minute.

Mr. EWING: Here are some special instructions.

(Special requests of defendant passed to Court).

The COURT: I wish you would have them written out in English so I can read them.

Mr. EWING: It is in English, and well written, both as to style and to thought.

(Special request of Plaintiff passed to the Court).

The COURT: (Reading from defendant's special request.) "If the plaintiff has made contradictory statements as to the manner of his injury, you may consider that as reflecting on his evidence, and if on the whole proof you are unable to say, whether the defendant was negligent, your verdict must be for the defendant.

A JUROR: We didn't exactly understand that charge.

The COURT: (Reading.) "If the plaintiff has made contradictory statements as to the manner of his injury, you may consider that as reflecting on his evidence, and if, on the whole proof you are unable to say whether the defendant was negligent, your verdict must be for the defendant." What is meant if the plaintiff fails to prove he was hurt by the negligence of the defendant, he cannot recover.

(Reading from plaintiff's special request.) "The Court instructs you that if you believe from the evidence that the plaintiff was directed by the engineer Hunter to get off the engine and examine the engine for defects, then while said plaintiff was obeying the direction of Hunter, it was Hunter's duty to look out for plaintiff and not move the engine until he knew that plaintiff was in a position of safety.

Mr. EWING: I want to take exception to that last statement on the ground that the fact that he moved up that engine if he was in a place of safety is not stated to be any cause of action in this case, and

not involved in the pleadings, and he was not injured by virtue of it.

We further except to the statement made that the Court
56 made to the jury that if they believe the facts as stated by the plaintiff which left out of — question the doctrine of assumed risk.

The COURT: I understand that the doctrine of assumed risk is abolished by the Employer's Liability Act, in so far as it relates to cases wherein the servant is injured because of the negligence of any of the officers, agents or employés, etc., of the carrier and contributory negligence is modified so as that it no longer bars the right of action but goes in reduction of the amount of recovery. But you reserve your exception.

Mr. EWING: Yes, now, your Honor stated that the only evidence contradicting the plaintiff is that contained in the statement. The defendant excepts to that as leaving out the statement and omitting the contradictory evidence by Doctors Thornton and Rudisill, and Mr. Hunt with respect to his mental condition on the 27th, and the contradictory evidence of Smith Hunter that he never saw the plaintiff on the ground, and didn't know he was on the ground at the time, but thought he was still in the cab.

The COURT: Gentlemen, in so far as I may have inadvertently misled you by stating the statement alleged to have been made by the plaintiff while he was in the hospital was the only testimony that contradicted the plaintiff, and in order that there may be no misunderstanding in your minds as to what I meant by that, I will say that that was all the evidence I remembered touching the manner of the occurrence of the accident which resulted in this injury. If there are other facts testified to by any witness in the case for the defendant on others, if it tends to contradict the statement of the plaintiff upon that question of any question in the case, you will consider it and give it proper weight in arriving at your verdict.

Mr. EWING: I thought possibly that was an inadvertent statement of your Honor.

The COURT: Yes, go ahead.

Mr. EWING: I want further — call attention to the contradictory statement of Smith Hunter that immediately after the accident he made a statement of how it happened.

The defendant excepts to the Court's statement in the general charge as to the force of plaintiff's statement as compared with the statements of the physicians, saying he testified to facts and they testified as to opinions.

Also the defendant excepts to the court's statement of the manner of weighing evidence with respect to—particularly to the statement of the court that they can consider as reflecting upon a witness
57 the statement he did not remember made by himself as being erroneous with respect to the statement of the plaintiff.

I understand your Honor charged the suit under the Employer's Liability Act?

The COURT: I charge the jury under the Employer's Liability Act.

Mr. EWING: I want to again renew my objection to the Court's

permitting the plaintiff to amend his declaration after the evidence was in; and the court's failure to give a directed verdict in favor of the defendant on the pleadings and on the evidence.

The COURT: Very well, sir.

Mr. EWING: I believe I have to except under this practice—it takes up a lot of unnecessary time, your Honor, to the refusal of the Court separately to give each one of the separate special instructions, Nos. 1, 2, 3, 4, 5. Is there any law requiring you to hold them in your hand?

The COURT: There is no law requiring you to make any exception at all. The Law permits you to do so.

Mr. EWING: Nos. 1, 2, 3, 4, 5, and 6—said instructions separately tendered, separately refused, and exceptions separately taken. I believe that is all.

And defendant's attorney then requsted the Court, after the regular charge, to further specially charge, as follows:

(Here copy each special request of defendant, further identification being waived by consent.)

1.

If you believe that the plaintiff saw the engine slowly moving and under such circumstances that the plaintiff saw or by reasonable care could have been seen that a "kicking switch" was about to be made, and that the plaintiff, with a torch in his left hand, stepped up on the cab step and was caused to fall by reason of a kicking switch; that is a jerking motion of the engine usual in such switching operations, your verdict must be for the defendant.

Declined.

2.

If the plaintiff knew or in the exercise of reasonable care should have known that a "kicking switch" was about to be made, and undertook to then board the engine, hampered with a torch in his left hand, and was thereby thrown, he was guilty of contributory negligence and cannot recover.

Declined.

3.

If you believe that plaintiff's negligence contributed, proximately, to his injury, he cannot recover, however slight the degree
58 of his negligence. If his contributory negligence is a proximate cause of the injury, if you so find the fact, in however slight a degree, he cannot recover.

Declined.

4.

If the Plaintiff has made contradictory statements as to the manner of his injury, you may consider that as reflecting on his evidence and if on the whole proof you are unable to say whether the defendant was negligent, your verdict must be for the defendant.

Given as modified.

5.

In determining whether plaintiff understood the facts stated by him to the witness Hunt you may look to the declaration filed herein to see whether he made the same statements to his lawyers. If you believe the facts to be as stated in the writing signed by plaintiff on April 27th., then you must find for the defendant.

Declined.

6.

Because a man is weak or in pain is of itself no reason why he cannot make an intelligent statement of the circumstances of the injury which produced the weakness or pain.

Declined.

This was all the proceedings in the case. Thereupon the jury retired to the jury room and after due consideration they returned into Court and announced that they found in favor of the plaintiff, and fixed his damages at $10,000.00.

The defendant filed its written motion for a new trial within and under the rules of the Court as follows:

District Court of the United States, Western District of Tennessee, Western Division.

No. 4129, C. C.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

Motion for a New Trial.

Filed February 7th, 1912. A. G. Mathews, Clerk.

Defendant, Southern Railway Company, moves the Court for a new trial because:

1.

The verdict of the jury is without evidence to sustain it.

2.

The verdict of the jury is against the evidence.

3.

The damages assessed by the jury are so excessive as to indicate passion or prejudice or caprice on the part of the jury.

59 4.

The Court erred in charging the jury:

(1) "If you find the evidence introduced by the plaintiff to be true as to the manner in which he was injured, and if you find

that the conduct, which that evidence discloses, on the part of the Engineer in charge of the engine was negligence, then the defendant is liable to the plaintiff for his injuries."

The above was error because vague and indefinite and insufficient in its statement of what would be negligence; because the engineer was plaintiff's fellow servant; because it leaves out of consideration the circumstances surrounding the accident.

(2) In charging the jury as to the written statement made by plaintiff, after the accident. The Court's charge on this branch of the case overlooked that the statement was in substantial accord with the facts averred in the declaration and the charge with respect to the jury's weighing of the evidence of the plaintiff with respect to this statement was so phrased and framed as to practically be a direction to the jury to disregard that statement. There was nothing to justify the Court's charge in this behalf,—no reason for it. It was highly prejudicial and calculated to inflame the jury against the defendant. In this connection the Court erred in saying to the jury:

"The Statement made by the plaintiff as to what he understood was his condition that day, is a statement made by an individual and possibly he could better understand his condition so far as being able to understand what occurred than any one else, but if he is mistaken about that and you believe he is, then you will give his testimony that weight accordingly."

(3) "The Court instructs you if you find from the evidence the plaintiff was directed by Engineer Hunter to get off the engine and examine the engine for defects, and that while said plaintiff was off by directions of Hunter, it was Hunter's duty to look out for plaintiff and not move the engine until he knew the plaintiff was in a position of safety."

The above placed on the engineer the sole responsibility for plaintiff's safety and is an incorrect statement.

5.

The Court erred in refusing to charge the jury as specially requested by the defendant in the various requests as submitted to the Court by the Defendant and by the Court refused.

Same are properly numbered and are on file and reference is made thereto.

60 6.

The Court erred in permitting the plaintiff, after the proof was closed and after defendant had moved for a peremptory instruction, to so amend the declaration as to change the basis of his right of action. The error in this behalf was intensified by the fact that the Court has permitted the plaintiff, without amendment, to testify to a state of facts in direct conflict with the facts as averred in the declaration and then charged the jury with elaboration and in prejudicial form with respect to a statement claimed by the witness Hunter to have been made to him a short time after the accident. The Court,

in effect, assailed the conduct of the witness Hunt and the accuracy of his evidence, though it was in accord with the statement of plaintiff's case as made in his declaration.

7.

The Court erred in admitting evidence as follows:

(*a*) Rule 563 of the defendant, which was with respect to the engineer permitting persons to ride on his engine.

(*b*) The Court erred in permitting the witness Furbrash to testify that he has been on the engine before the accident. It was collateral and confusing.

(*c*) The Court erred in permitting the witness Furbrash to tell of a conversation with Hunter prior to the accident with respect to a matter having no connection with the accident as it was confusing to the jury and prejudicial to the defendant and yet threw no light on the attention or want of attention of the engineer at a subsequent period when the accident took place.

(*d*) The Court erred in the method adopted by the Court of interrogating the witness S. W. Hunt and in asking the witness:

"The COURT: Would you say a man was in a normal condition who, less than forty-eight hours before has a leg amputated?"

The written statement of the plaintiff was in exact accord with the facts as pleaded by him.

8,.

The Court erred in overruling defendant's motion for a peremptory instruction.

Wherefore defendant moves the Court for a new trial and to set aside the verdict of the jury.

CARUTHERS EWING,
Attorney for Defendant.

Service of this motion acknowledged this 6th day of February, 1912.

JOHN L. STOUT,
Attorney for Plaintiff.

61 In the District Court of the United States, Western District of Tennessee, Western Division.

No. 4129, C. C.

W. O. GADD,
vs.
SOUTHERN RAILWAY COMPANY.

Memo. Opinion on Motion for New Trial.

Filed February 12th, 1912. A. G. Mathews, Clerk.

A careful examination of the several grounds assigned for a new trial does not lead me to believe that any error prejudicial to the

defendant was committed. I am satisfied with the verdict of the jury, and an order will be entered, overruling the motion for a new trial.

McCALL, *Judge.*

The Court overruled same and defendant duly excepted. Defendant tenders this its Bill of Exception to the action of the Court in the premises and to the action of the Court in overruling its motion for a new trial and same being examined by the Court and found correct is signed, sealed and made a part of the record.

JNO. E. McCALL, *Judge.*

In the District Court of the United States, Western District of Tennessee, Western Division.

No. 4129, C. C.

W. O. GADD,
vs
SOUTHERN RAILWAY COMPANY.

Petition for Writ of Error.

Filed February 15th, 1912. A. G. Mathews, Clerk.

The Defendant, Southern Railway Company, in the above styled case feeling itself aggrieved by the verdict of the jury and the judgment of the District Court of the United States of America for the Western Division of the Western District of Tennessee thereon in favor of the Plaintiff, W. O. Gadd, and against the said defendant as entered on the 19th day of January, A. D. 1912, comes now by its attorney of record in this case, Caruthers Ewing, and petitions said Court for an odrer allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Sixth Judicial Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which defendant shall give and furnish upon said writ of error, and that upon the giving and furnishing of such further proceedings in the District Court of the United States for the Western Division of the Western District of Tennessee be superseded, suspended and stayed until the determination of said Writ of Error by the United States Circ-
62 cuit Court of Appeals for the Sixth Circuit.

Said defendant accompanying this petition for Writ of Error with its written Assignments of Error which are intended to be urged by it, which it asks to be filed by the Clerk of this Court, as a part of the record in this case.

And your petitioner will ever pray, etc.

CARUTHERS EWING,
Attorney for Defendant.

Granted:
JNO. E. McCALL,
United States District Judge.

UNITED STATES OF AMERICA,
Western District of Tennessee, Western Division:

In the District Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 15th day of February, A. D. 1912, in the following cause, to-wit:

No. 4129, C. C.

W. O. GADD,
vs.
SOUTHERN RAILWAY COMPANY.

Order Granting Defendant's Petition for a Writ of Error.

This day came the defendant by its attorney of record herein and presents to the Court and files herein its petition praying for the allowance of a Writ of Error to the United States Circuit Court of Appeals for this, the Sixth Judicial Circuit, to be holden at the City of Cincinnati, in the State of Ohio, together with its assignment of Errors in such behalf;

Upon consideration whereof, the prayer of said petition is hereby granted and such Writ of Error, awarded upon the filing of a Writ of Error bond herein — the penal sum of Five Hundred (500.00) Dollars with good and sufficient surety according to law.

In the District Court of the United States, Western District of Tennessee, Western Division.

No. 4129, C. C.

W. O. GADD,
vs.
SOUTHERN RAILWAY COMPANY.

Bond on Writ of Error.

Filed February 15th, 1912. A. G. Mathews, Clerk.

63 Know All Men By These Presents, That we, Southern Railway Company as principal, and Caruthers Ewing, as surety, are held and firmly bound unto the said plaintiff, W. O. Gadd, in the full and just sum of Five Hundred ($500.00) Dollars, lawful money of the United States of America, to be paid to the said defendant in error, W. O. Gadd, his certain attorneys, representatives or assigns, to which payment, well and truly to be made, we bind

ourselves, our heirs, representatives, administrators and assigns joint- and severally by these presents.

Sealed with our seals and dated this 15th day of February, A. D. 1912.

Whereas, lately at a District Court of the United States for the Western Division of the Wetsern District of Tennessee in a suit pending in said Court, between W. O. Gadd, as plaintiff, and Southern Railway Company, as defendant, a judgment was rendered against the said Southern Railway Company, defendant, and the said Southern Railway Company, defendant, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said W. O. Gadd, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the City of Cincinnati, in said Circuit on the 16th day of March next.

Now, the conditions of the above obligation are such that if the said Southern Railway Company shall prosecute said writ of error to effect and answer all costs and damages if it fails to make the said plea good, then the above obligations to be void, else to remain in full force and virtue.

SOUTHERN RAILWAY COMPANY,
By CARUTHERS EWING, *Attorney,*
CARUTHERS EWING, *Surety.*

Signed, sealed delivered, asknowledged and taken before me this the 15th day of February, A. D. 1912.

[SEAL.] A. G. MATHEWS, *Clerk,*

In the District Court of the United States, Western District of Tennessee, Western Division.

No. 4129, C. C.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

64 *Assignments of Error.*

Filed February 15th, 1912. A. G. Mathews, Clerk.

The defendant, Southern Railway Company, in connection with its petition for Writ of Error, makes the following assignments of error, which it avers occurred upon the trial of the cause to-wit:

1.

The verdict of the jury is without evidence to sustain it.

2.

The verdict of the jury is against the evidence.

3.

The damages assessed by the jury are so excessive as to indicate passion or prejudice or caprice on the part of the jury.

4.

The Court ered in charging the jury:

(1) "If you find the evidence introduced by the plaintiff to be true as to the manner in which he was injured, and if you find that the conduct, which that evidence discloses, on the part of the Engineer in charge of the engine was negligence, then the defendant is liable to the plaintiff for his injuries."

The above was error because vague and indefinite and insufficient in its statement of what would be negligence; because the engineer was plaintiff's fellow servant, because it leaves out of consideration the circumstances surrounding the accident.

(2) In charging the jury as to the written statement made by plaintiff, after the accident. The Court's charge on this branch of the case overlooked that the statement was in substantial accord with the facts averred in the declaration and the charge with respect to the jury's weighing of the evidence of the plaintiff with respect to this statement was so phrased and framed as to practically be a direction to the jury to disregard that statement. There was nothing to justify the Court's charge in this behalf,—no reason for it. It was highly prejudicial and calculated to inflame the jury against the defendant. In this connection the Court erred in saying to the jury:

"The Statement made by the plaintiff as to what he understood was his condition that day, is a statement made by an individual and possibly he could better understand his condition so far as being able to understand what occurred than any one else, but if he is mistaken about that and you believe he is, then you will give his testimony that weight accordingly."

65 (3) "The Court instructs you if you find from the evidence the plaintiff was directed by Engineer Hunter to get off the engine and examine the engine for defects, and that while said plaintiff was off by directions of Hunter, it was Hunter's duty to look out for plaintiff and not move the engine until he knew the plaintiff was in a position of safety."

The above placed on the engineer the sole responsibility for plaintiff's safety and is an incorrect statement.

5.

The Court erred in refusing to charge the jury as specially requested by the defendant and by the Court refused as follows:

(*a*) "If you believe that the plaintiff saw the engine slowly moving and under such circumstances that the plaintiff saw or by reasonable care could have seen that a 'kicking switch' was about to be made, and that the plaintiff, with a torch in his left hand, stepped

up on the cab step and was caused to fall by reason of a 'kicking switch' that is a jerking motion of the engine usual in such switching operations, your verdict must be for defendant."

The above is a correct statement of the law and there was evidence to support it and it was not given in the general charge and the defendant was entitled to have the benefit of the instruction.

(*b*) "If Plaintiff knew or in the exercise of reasonable care should have known that a 'kicking switch' was about to be made and undertook to then board the engine, hampered with a torch in his left hand, and was thereby thrown, he was guilty of contributory negligence and cannot recover."

The above is a correct statement of the law and was applicable to the facts of the case, was not given in charge to the jury and the defendant was entitled thereto.

(*c*) "If you believe that plaintiff's negligence contributed, proximately, to his injury, he cannot recover, however slight the degree of his negligence. If his contributory negligence is a proximate cause of the injury, if you so find the fact, in however slight a degree, he cannot recover."

The above is a correct statement of the law and was applicable to the facts of the case, was not given in charge to the jury and the defendant was entitled thereto.

(*d*) "In determining whether plaintiff understood the facts stated by him to the witness Hunt you may look to the declaration filed herein to see whether he made the same statements to his
66 lawyers. If you believe the facts to be as stated in the writing signed by plaintiff on April 27th then you must find for defendant."

The above is a correct statement of the law and was applicable to the facts of the case, was not given in charge to the jury and the defendant was entitled thereto.

(*e*) "Because a man is weak or in pain is of itself no reason why he cannot make an intelligent statement of the circumstances of the injury which produced the weakness or pain."

The above is a correct statement of the law and was applicable to the facts of the case, was not given in charge to the jury and the defendant was entitled thereto.

6.

The Court erred in giving after the regular charge the following charge at the request of the plaintiff:

"The Court instructs the jury that if they believe from the evidence that plaintiff was directed by engineer Hunter to get off the engine and examine the engine for defects and that while said plaintiff was obeying the direction of Hunter, it was Hunter's duty to look out for plaintiff and not move the engine until he knew that plaintiff was in a position of safety."

The above made the master an insurer and he wholly eliminated any question of whether the master breached any duty he owed to the plaintiff except as an insurer.

7.

The Court erred in permitting the plaintiff, after the proof was closed and after defendant had moved for a peremptory instruction, to so amend the declaration as to change the basis of his right of action. The error in this behalf was intensified by the fact that the Court has permitted the plaintiff, without amendment, to testify to a state of facts in direct conflict with the facts as averred in the declaration and then charged the jury with elaboration and in prejudicial form with respect to a statement claimed by the witness Hunter to have been made to him a short time after the accident. The Court, in effect, assailed the conduct of the witness Hunt and the accuracy of his evidence, though it was in accord with the statement of plaintiff's case as made in his declaration.

8.

The Court erred in admitting evidence as follows:

(*a*) Rule 563 of the defendant, which was with respect to the engineer permitting persons to ride on his engine.

(*b*) The Court erred in permitting the witness Furbrash to testify that he has been on the engine before the accident. It was collateral and confusing.

67 (*c*) The Court erred in permitting the witness Furbrash to tell of a conversation with Hunter prior to the accident with respect to a matter having no connection with the accident as it was confusing to the jury and prejudicial to the defendant and yet threw no light on the attention or want of attention of the engineer at a subsequent period when the accident took place.

(*d*) The Court erred in the method adopted by the Court of interrogating the witness S. W. Hunt and in asking the witness:

"The COURT: Would you say a man was in a normal condition who, less than forty-eight hours before has a leg amputated?"

The written statement of the plaintiff was in exact accord with the facts as pleaded by him.

9.

The Court erred in overruling defendant's motion for a peremptory instruction.

Wherefore, defendant prays that the judgment of the District Court may be reversed.

CARUTHERS EWING,
Attorney for Defendant.

District Court of the United States, Western District of Tennessee.
Western Division.

No. 2129, C. C.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

Supersedeas Bond.

Filed February 15th, 1912. A. G. Mathews, Clerk.

Know all men by these presents, that we, Southern Railway Company, principal, and Caruthers Ewing, as surety, are held and firmly bound unto said W. O. Gadd in the full and just sum of Ten Thousand Five Hundred ($10,500.00) Dollars, lawful money of the United States of America, to be paid to the said W. O. Gadd, for the payment of which well and truly to be made we hereby bind ourselves jointly and severally, and our joint and several heirs, executors, administrators and assigns by these presents.

Signed by us, sealed with our seals, and dated at Memphis, Tennessee, this 15th day of February, 1912.

Whereas the above named principal has prosecuted a Writ of Error to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, holden at Cincinnati, in the State of Ohio, to reverse the judgment rendered in the above entitled suit against said principal by the District Court of the United States for the Western
68 Division of the Western District of Tennessee at Memphis, Tennessee.

Now, therefore, the condition of the foregoing obligation is such that if the above bounded principal shall prosecute its Writ of Error to effect, and answer all costs and damages if it fails to make its plea and said Writ of Error good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

SOUTHERN RAILWAY COMPANY,
By CARUTHERS EWING, *Attorney.*
CARUTHERS EWING, *Surety.*

Signed, sealed, delivered and acknowledged before me, at Memphis, Tennessee, this 15th day of February, A. D. 1912.

A. G. MATHEWS, *Clerk,*
By E. J. HEIDEL,
Deputy Clerk.

Approved:

JOHN E. McCALL,
U. S. District Judge.

In the District Court of the United States for the Western Division of the Western District of Tennessee.

No. 4129, C. C.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

Citation.

In the United States Circuit Court of Appeals for the Sixth Circuit.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To W. O. Gadd, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the City of Cincinnati, in the State of Ohio in said Circuit, on the 16th day of March next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western Division of the Western District of Tennessee, wherein the Southern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this the 15th day of February in the year of
69 our Lord One Thousand, Nine Hundred and Twelve, and of the Independence of the United States the one hundred and thirty-sixth year.

[SEAL.]

JNO. E. McCALL,
United States District Judge.

Acceptance of Service.

As Counsel for W. O. Gadd, appellee, I do hereby accept due and legal service of the foregoing Citation and acknowledge to have this day received a copy thereof.

This 15th day of February, 1912.

JOHN L. STOUT,
Attorney for W. O. Gadd.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

United States Circuit Court of Appeals for the Sixth Circuit.

The President of the United States to the Honorable the Judges of the District Court of the United States for the Western District of Tennessee, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court of the United States, before you or some of you between W. O. Gadd, as plaintiff, and Southern Railway Company, as defendant, a manifest error hath happened to the great damage of the said Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if the judgment be therein given, that then under your seal, distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati in said Circuit of the 16th day of March, A. D. 1912 next, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals, may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, The Honorable Edward Douglas White, Chief Justice of the United States and the Seal of said District Court the
70 15th day of February, A. D. 1912, and of the Independence of the United States, the 136th year.

A. G. MATHEWS,
Clerk of the District Court of the United States, Western District of Tennessee,
By E. J. HEIDEL,
Deputy Clerk, District Court of the United States, Memphis, Tennessee.

Allowed by:

[SEAL.] JNO. E. McCALL,
U. S. District Judge.

I, John L. Stout, attorney for and on behalf of W. O. Gadd, do hereby accept due and legal service of the within writ of error, and that a copy thereof has been filed in the Clerk's office of said Court on this 15th day of February, 1912.

JOHN L. STOUT,
Attorney for W. O. Gadd.

UNITED STATES OF AMERICA:

District Court of the United States, Western District of Tennessee, Western Division.

In the District Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 15th day of March, A. D. 1912, in the following cause, to-wit:

No. 4129, C. C.

W. O. GADD
vs.
SOUTHERN RAILWAY COMPANY.

In this case, it appearing to the Court that additional time is necessary in which to complete the transcript of the record and proceedings had herein, and for filing same in the United States Circuit Court of Appeals, for this, the Sixth Judicial Circuit;

It is therefore, hereby ordered by this Court that the time for filing said record, be, and it is hereby extended to April 15th, 1912, and the same additional time is allowed the plaintiff in error to make the deposit of Thirty-five Dollars required by Rule 16 of said appellate Court.

71 THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit:

District Court of the United States, Western District of Tennessee.

I, A. G. Mathews, Clerk of the District Court of the United States, for the Western District of Tennessee, do hereby certify that the papers hereto attached, are a full, true, perfect and correct copies of the originals and of the entire record and proceedings in said Court, including the original Citation and Writ of Error as the same now appears of record and upon the files in my office, in the following cause, to-wit:

No. 4129, C. C.

W. O. GADD
vs.
THE SOUTHERN RAILWAY COMPANY.

The testimony Whereof, I have hereunto written my name and affixed the Seal of said Court at my office in the City of Memphis,

Tennessee, this 2nd. day of April A. D. 1912, and of the Independence of the United States the 136th year.

A. G. MATHEWS, *Clerk.*

Authentication.

I, John E. McCall, a Judge of said Court, do hereby certify that A. G. Mathews, whos- signature appears to the foregoing certificate is, and was at the date of the same, Clerk of said Court and that his attestation is in due form.

[SEAL.]

JNO. E. McCALL,
Jno. E. McCall,
Judge of the District Court of the United States for the District Aforesaid.

72 And afterwards to-wit on April 8, 1912, praecipe for appearance of counsel was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2295.

THE SOUTHERN RAILWAY COMPANY.
vs.
W. O. GADD.

Frank O. Loveland Clerk of said Court:

Please enter my appearance as Counsel for the Plaintiff in Error.

CARUTHERS EWING.

And afterwards to-wit on February 12, 1913, an entry was made upon the Journal of said Court in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2295.

SOUTHERN RAILWAY COMPANY
vs.
W. O. GADD.

Before Warrington, Knappen and Denison, C. J.J.

Entry.

This cause is argued in part by Mr. Caruthers Ewing for the plaintiff in error and is continued until tomorrow for further argument.

73 And afterwards to-wit on February 13, 1913, an entry was made upon the Journal of said Court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2295.

SOUTHERN RAILWAY COMPANY
vs.
W. O. GADD.

Entry.

This cause is further argued by Mr. John L. Stout for the defendant in error and by Mr. Caruthers Ewing for the plaintiff in error and is submitted to the Court.

And afterwards to-wit, on May 6, 1913, a judgment was entered in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2295.

SOUTHERN RAILWAY COMPANY
vs.
W. O. GADD.

Error to the District Court of the United States for the Western District of Tennessee.

Judgment.

74 This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed with costs.

And on the same day, to-wit, May 6, 1913, an opinion was filed in said cause which reads and is as follows:

Opinion.

75 Filed May 6, 1913. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2295.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
W. O. GADD, Defendant in Error.

Error to the District Court of the United States for the Western District of Tennessee.

Submitted February 13, 1913; Decided May 6, 1913.

Before Warrington, Knappen and Denison, Circuit Judges.

KNAPPEN, *Circuit Judge:*

Plaintiff, while in the employ of defendant as a fireman on a switch engine belonging to defendant, in its yards at Memphis, Tennessee, lost his leg by being run over by the switch engine referred to, through the alleged negligence of defendant's engineer operating the same. He brought this action under the Employers Liability Act of April 22, 1908 (35 Stat. at L. 65, Chap. 149), as amended by the Act of April 5, 1910 (36 Stat. at L. 291, Chap. 143). The injury occurred April 25, 1911. There was
76 trial to a jury and verdict and judgment for plaintiff.

It is conceded that at the time of the injury the switch engine was engaged in making up a train in interstate commerce. The evidence tended to show that in the course of the switching operations something seemed wrong with the engine; that the night was dark; that the engineer told plaintiff to take his torch and see what the trouble was; that plaintiff accordingly took his torch and "started down the fireman's side"; that before he reached the ground the engineer started again; that plaintiff got back on the engine and told the engineer he could not examine it unless the engine stood still a minute; that the engineer told him to "wait until we stop again"; that when the engine next stopped plaintiff told the engineer to give him a chance and he would get down and see what the trouble was; that the engineer told him to "hurry-up"; that plaintiff again took his torch and got down on the engineer's side and stepped to the driver, where he could see; that while in that position the engineer started the engine backing; that plaintiff got on the footboard as it passed, and when the engine came to a stop plaintiff walked to the steps, on the engineer's side, to get in the cab; that just as he was making an effort to get on and reaching to seize the handholds, and while in plain view of the engineer, and

with his torch in his hand, the engine was suddenly started forward without signal or warning of any kind, and plaintiff — thereby jerked and thrown under the tank, the wheels of which ran over his leg. The engineer testified that the "kick" was made in obedience to a signal from the switchman.

1. The declaration is at least susceptible of a construction, and apparently was intended to allege, that plaintiff mounted one of the steps leading to the cab while the engine was moving slowly forward, and that the "kicking" occurred after plaintiff was so upon the step. During the closing argument for plaintiff, after motion for directed verdict (later referred to) had been made, the declaration was allowed to be amended so as to allege that the engine was standing still when plaintiff attempted to mount the step, and was started while plaintiff was in the act of taking such step. This action is criticised as an abuse of discretion. The amendment was, however, made to meet the proofs actually introduced without objection on the ground of variance. Plaintiff had been fully cross-examined upon
77 his statement that the engine was standing still when he attempted to mount the steps, and had been confronted not only with the declaration, but with a written statement made soon after the accident, both the declaration and statement being claimed to be inconsistent with the testimony that the engine was standing still. In connection with the application for leave to amend, plaintiff's counsel remarked that "the court knows that the statements of a declaration are the lawyer's statement." The only objection to the amendment specifically stated was "to any statement that would indicate or convey to the jury at all that the statement which was by leave of the court altered is not plaintiff's or that he is not bound by it." The amendment was clearly within the discretion of the trial court. Mexican Central Ry. Co. v. Pinckney, 149 U. S. 194, 201; Pennsylvania Co. v. Whitney, (C. C. A. 6th Circuit), 169 Fed. 572, 578.

2. In support of the motion for a peremptory instruction (made at the close of the testimony, and, after the argument, overruled), defendant invokes the well settled rule (*) that an employer is not an insurer of the safety of its employees, but is bound only to exercise ordinary care to that end; and that the employee assumes the risks of the employment, so far as they are incident to the usual method of work. It is contended that the "kicking" in question was the usual and ordinary movement in the handling of a switch engine engaged in the making or breaking up of trains, and thus that defendant is not liable for plaintiff's injuries. But while the kicking of cars, and thus the sudden starting of a switch engine, was a usual movement in the making and breaking up of trains, yet there is no evidence of any rule or practice permitting the sudden starting of an engine under the circumstances claimed by plaintiff to exist here, including the alleged facts that plaintiff was in plain

(*) Mason & O. R. R. Co. v. Yockey (C. C. A. 6th Circuit) 103 Fed. 265; Washington, Etc., R. R. C. v. McDade, 135 U. S. 554; Union Pacific R. R. Co. v. O'Brien, 161 U. S. 451.

view of the engineer (and in a position liable to be injured by the sudden starting of the engine), and that the start was made without notice or warning of any kind. Indeed, defendant does not urge, as we understand the argument, that defendant would not be liable if the engineer had actually seen that plaintiff was in the act
78 of boarding the engine and made the sudden start complained of without signal or warning. The record falls but little short of an admission that such an act would be negligence. But it is enough to say that there can be no doubt of its negligent character in law. The contention that the engineer is not shown to have seen plaintiff is answered by the fact that there was express testimony not only that plaintiff was in plain view of the engineer, and with a torch in his hand, but that no reason existed why the engineer should not have seen him. A question of fact for the jury was thus presented.

The jury was instructed that if they believed the evidence introduced by plaintiff, as to the manner of the injury, and that the conduct of the engineer in charge, as disclosed by that evidence, was negligent, the defendant would be liable. This instruction was excepted to as leaving out of question the doctrine of assumed risk. In that connection the court expressed the opinion that that doctrine is abolished by the Employers Liability Act, in so far as it relates to cases wherein the employee is injured because of the negligence of any of the officers, agents or employees of the carrier.

Defendant insists that the doctrine of assumption of risk at common law is not abrogated by the Employers Liability Act. In our opinion, this question (as limited by the statement of the trial court) does not exist here, for there is no reason for argument that even at common law the employee assumed the risk of the employer's negligence from an unusual and unexpected method of operation, that is to say, not incidental to the ordinary method; and by the terms of the Employers Liability Act the negligence of the engineer was the negligence of defendant. Central R. of New Jersey v. Young, (C. C. A. 3rd Circuit), 200 Fed. 359, 366. Under the rule that, on motion for directed verdict, that view of the evidence most favorable to the plaintiff must be taken (Erie R. R. Co. v. Rooney,—C. C. A. 6th Circuit,—186 Fed. 16, 19), there was no error in submitting the case to the jury.

3. Complaint is made of an instruction that while the plaintiff was obeying the engineer's direction, it was the latter's "duty to look out for plaintiff, and not move the engine until the plaintiff was in a position of safety." This instruction is here criticised as requiring actual knowledge on the part of the engineer, that plaintiff was in a position of safety, instead of merely the exercise of ordinary care to that end. But the exception to this instruction did not
79 raise the criticism in question, and we therefore cannot consider it. It is to be assumed that had the court's attention been called to the criticism now urged, due correction would have been made.

4. It was not error to permit evidence that a friend of the engineer,

not an employee of the railway company, was, at the time of the accident, riding in the cab by permission of the engineer, in violation of the company's rule. Evidence was also permitted of a conversation between the engineer and a car inspector (also riding in the cab) shortly before the accident. The court held the conversation itself immaterial, but allowed evidence of the fact, and that the engineer's friend was still on the engine when the inspector left, "so far as it might or might not throw light upon the attention or want of attention the engineer was giving his train, by reason of this individual being on the engine." We cannot say this evidence was immaterial, in view of the engineer's testimony that the next time he remembered seeing plaintiff after the return to the engine (following the examination on the fireman's side) was when plaintiff "was down on the ground and hollering to come there quick."

We have not referred to all the alleged errors discussed in defendant's brief. We have, however, considered them all, and are of opinion that no prejudicial error has been committed.

The judgment of the district court is accordingly affirmed.

80 And afterwards to-wit on June 2, 1913, a petition for writ of error was filed which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2295.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error.
vs
W. O. GADD, Defendant in Error.

Petition for Writ of Error.

Your petitioner, The Southern Railway Company, plaintiff in error in the above-entitled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Sixth Circuit, and that a judgment has been therein rendered on the 6th day of May, 1913, affirming a judgment of the District Court of the United States for the Western District of Tennessee, and that the matter in controversy in said suit exceeds Three Thousand Dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is

81 not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon Writ of Error; and therefore your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the

Sixth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignments of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.
By CARUTHERS EWING, *Its Attorney.*

The foregoing petition is granted, and writ of error allowed as prayed for upon plaintiff's giving bond according to law in the sum of fifteen thousand dollars to operate as a supersedeas.

LOYAL E. KNAPPEN,
United States Circuit Judge for the Sixth Circuit.

82 And on the same day, to-wit, June 2, 1913, assignments of error were filed which read and are as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2295.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error.
vs.
W. O. GADD, Defendant in Error.

Assignment of Errors.

And now comes the plaintiff in error, The Southern Railway Company, by Caruthers Ewing, its attorney and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Sixth Circuit, in the above entitled cause, and of the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to-wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Western District of Tennessee for Ten Thousand Dollars and costs of suit entered in the District Court on January 19th, 1912, in favor of said defendant in error and against said plaintiff in error, said judgment of affirmance being entered on May
83 6, 1913.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court aforesaid, and in not remanding said cause to said District Court with directions (1) to dismiss the action, or (2) award plaintiff in error a new trial.

Third. Said Circuit Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause. (Rec. p. 64).

Fourth. Said Circuit Court of Appeals erred in not sustaining the fourth assignment of error upon the record in said cause, and particularly subdivisions one and three thereof. (Rec. 64-65).

Fifth. Said Circuit Court of Appeals erred in not sustaining the fifth assignment of error upon the record in said cause, and particularly sub-paragraph *a* thereof. (Rec. p. 65).

Sixth. Said Circuit Court of Appeals erred in not sustaining the sixth assignment of error upon the record in said cause. (Rec. p. 66).

Seventh. Said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of said defendant in error for costs of suit in said Circuit Court of Appeals.

84 Wherefore, the said Southern Railway Company, Plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error the said judgment of the said United States Circuit Court of Appeals be reversed, annulled and for naught esteemed, and that said cause be remanded to the United States District Court for the Western District of Tennessee, with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

CARUTHERS EWING,
Attorney for Plaintiff in Error.

And afterwards to-wit on June 19, 1913, a bond was filed in said cause which reads and is as follows:

The Fidelity and Casualty Company of New York

No. —

Know all men by these presents, That we, Southern Railway Company as principal and The Fidelity and Casualty Company of New York as surety, are held and firmly bound unto

85 W. O. Gadd in the full and just sum of Fifteen Thousand Dollars, to be paid to the said W. O. Gadd, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 16th day of June, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Sixth Circuit in a suit depending in said court, between the Southern Railway Company, Plaintiff in Error and W. O. Gadd, Defendant in Error, a judgment was rendered against the said Southern Railway Company and the said Southern Railway Company having obtained an allowance of writ of error from the Supreme Court of the United States to the United States Circuit

Court of Appeals for the Sixth Circuit to reverse the judgment in the aforesaid suit.

Now, the condition of the above obligation is such, That if the said Southern Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to re-
86 main in full force and virtue.

SOUTHERN RAILWAY COMPANY,
By CARUTHERS EWING, *Attorney.*
THE FIDELITY & CASUALTY COMPANY OF NEW YORK,
By R. A. WORKMAN, *Attorney in Fact.*

Sealed and delivered in the presence of
[SEAL.] C. E. BOWELL.

Approved by
LOYAL E. KNAPPEN,
United States Circuit Judge.

STATE OF TENNESSEE,
County of Shelby, ss:

R. A. Workman being duly sworn, deposes and says that he is the attorney of The Fidelity and Casualty Company of New York at Memphis, State of Tennessee; that he knows the corporate seal of the said Company; that the said Company was duly and legally incorporated under the laws of the State of New York; that the said Company is duly authorized to transact surety business — United States of America; and that the assets of the said company, unincumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of two and one-half million dollars.

87 He further deposes and says that he executed the attached bond by virtue of authority conferred upon him by a certain power of attorney executed under an authorization of the board of directors of the said Company; that the said power of attorney is now in full force and effect; and that he signed the attached bond as Attorney for the said Company under the said authority.

R. A. WORKMAN, *Attorney.*

Sworn to before me this 7th day of June, 1913.

[SEAL.] CLYDE RICHERT,
Notary Public.

And on the same day, to-wit, June 19, 1913, a writ of error was filed in the words and figures as follows:

88 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals for the Sixth Circuit before you, or some of you, between Southern Railway Company, Plaintiff in Error and W. O. Gadd, Defendant in Error a manifest error hath happened, to the great damage of the said Southern Railway Company, Plaintiff in Error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 9th day of June, in the year of our Lord one thousand nine hundred and thirteen.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Allowed by
LOYAL E. KNAPPEN,
United States Circuit Judge—Sixth Circuit.

United States Circuit Court of Appeals, for the Sixth Circuit, *ss:*

In pursuance of the command of the within writ of error, I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby transmit under the seal of said Court, a true, full and complete copy of the record and proceedings in said Court in said cause and matter in said writ of error stated; together with all things concerning the same, to the Supreme Court of the United States, together with said writ of error and the citation to said defendant in error.

Witness my official signature and the seal of said Court at Cincinnati, Ohio, in said Circuit, this 27th day of June, 1913.

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] Filed Jun- 1, 1913. Frank O. Loveland, Clerk.

89 UNITED STATES OF AMERICA, *ss:*

To W. O. Gadd, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit wherein Southern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Loyal E. Knappen, United States Circuit Judge for the Sixth Circuit, this twentieth day of June, in the year of our Lord one thousand nine hundred and thirteen.

LOYAL E. KNAPPEN,
United States Circuit Judge—Sixth Circuit.

Service accepted. This June 24, 1913.

JOHN L. STOUT,
Att'y for W. O. Gadd.

90 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings together with the original writ of error and citation in the case of Southern Railway Company vs. W. O. Gadd No. 2295, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 27th day of June A. D. 1913.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 23,796. U. S. Circuit Court Appeals, 6th Circuit. Term No. 645. Southern Railway Company, plaintiff in error vs. W. O. Gadd. Filed July 17th, 1913. File No. 23,796.

Supreme Court, U. S.
FILED
JAN 7 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States

No. 940

October Term 1913

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error

vs.

W. O. GADD,
Defendant in Error

Motion of Defendant in Error to Affirm, Notice and Brief in Support of Said Motion

JOHN L. STOUT,
Attorney for Defendant in Error.

PIONEER PRINTING CO., MEMPHIS

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I.

LIST OF CASES.

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II.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM 1913.
No. 645.

Southern Railway Company,
Plaintiff in Error,

vs.

W. O. Gadd, Defendant in Error.

MOTION OF DEFENDANT IN ERROR TO AFFIRM.

Now comes W. O. Gadd, the defendant in error, by John L. Stout, his attorney, and moves this Court to affirm the judgment of the Circuit Court of Appeals, Sixth Circuit, on the grounds that it is manifest that the writ of error herein was taken out for the purpose of delay only, and that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

JOHN L. STOUT,

Attorney for Defendant in Error.

III.

MR. CARUTHERS EWING,

Attorney for Plaintiff in Error,

Central Bank Building, Memphis, Tennessee.

SIR:

Please take notice that on all the papers and proceedings herein, I shall submit to the Supreme Court of the United States at a stated term thereof on Monday, January 26, 1914, at the Capitol, in the City of Washington, District of Columbia, at the opening of the Court on that day, or as soon thereafter as I may be heard, the motion to affirm, of which the foregoing is a copy; and that I shall submit with said motion, in support of the same, the brief of argument annexed.

Memphis, Tennessee, January 3, 1914.

JOHN L. STOUT,

Attorney for Defendant in Error.

Central Bank Building, Memphis, Tenn.

Copy of above notice, together with a copy of a motion of defendant in error, W. O. Gadd, to affirm the judgment in above styled cause, and a copy of printed brief in support thereof, received by me this 3d day of January, 1914.

(Signed) CARUTHERS EWING,

Attorney for Plaintiff in Error, Southern Railway Company.

No. 645.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1913.

SOUTHERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

W. O. GADD, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR IN SUPPORT OF MOTION TO AFFIRM.

The defendant in error, W. O. Gadd, was injured April 25, 1911.

Transcript, p. 18.

A verdict and judgment were rendered in his favor and against plaintiff in error, Southern Railway Company, January 19, 1912.

Transcript, p. 9.

The Circuit Court of Appeals, Sixth Circuit, affirmed the judgment May 6, 1913.

Transcript, p. 66.

The plaintiff in error sued out a writ of error to the Circuit Court of Appeals.

Transcript, p. 70.

This case is now before this Court on motion of defendant in error to affirm the judgment of the Circuit Court of Appeals on the grounds that the writ of error was sued out for the purpose of delay, and that the questions on which the decision depends are so frivolous as not to need further argument.

Rule 6, paragraph 5.

Mo. Pac. R. Co. v. Castle, 224 U. S. 541, 544.

This action was instituted under the Employer's Liability Act of April 22, 1908, as amended by the Act of April 5, 1910.

Transcript, pp. 1, 67.

It is conceded that the train that was being made up by the switch engine on which defendant in error was employed when injured was an interstate freight train carrying interstate traffic.

Transcript, pp. 26, 31, 67.

STATEMENT OF THE CASE.

On April 25, 1911, defendant in error, W. O. Gadd, was employed by plaintiff in error, Southern Railway Company, in the capacity of fireman of a switch engine in its yards in Memphis, Tennessee. On that date, about 10:30 p. m., he was injured by the switch engine on which he was employed running over his left leg, necessitating its amputation.

The switch engine and switching crew, at the time of the accident, were engaged in switching together cars loaded with interstate freight.

Transcript, p. 26.

While engaged in above stated switching operations, defendant in error saw sparks flying from a driving wheel of the switch engine, and so informed Engineer Hunter, who was in charge of the engine. When the engine stopped, Engineer Hunter directed defendant in error to take his torch and see what was causing the sparks. Defendant in error got his torch and started to leave the engine cab on the fireman's side in obedience to engineer's orders, but before reaching the ground the engineer started the engin moving. Whereupon, defendant in error returned to the cab and informed Engineer Hunter that he couldn't examine the engine if it did not remain still. The engineer told him to wait until the engine again stopped. In a short while, the engine stopped and defendant in error said to Engineer Hunter: "Give me a chance, and I will get down and see what the trouble is." And Engineer Hunter replied, "Hurry up."

Again defendant in error got his torch and left the cab from the engineer's side, and walked to the driving wheel in front of the engineer. With a lighted torch in his hands, defendant in error stood between the driving wheels and was looking under the engine to discover the cause of the flying sparks, as directed by the engineer, when, without any warning to defendant in error, and wholly indifferent to his safety, the engineer started the engine moving backwards.

Defendant in error averted injury by quickly stepping backwards, and, as the front of the engine passed, got on the footboard attached to the front

end of the engine, and there remained until the engine stopped. He then left the footboard, and with lighted torch in his hand, walked to the cab on the engineer's side, in plain view of the engineer, to resume his duties there. While the engine was standing still, defendant in error attempted to board the engine, and had taken hold of the grab-iron to climb up into the cab, when, without any warning, Engineer Hunter suddenly started the engine forward with a jerk in order to kick a car, and defendant in error was thrown under the engine and the wheels passed over his leg, crushing it, and several hours afterwards his leg was amputated.

The night was dark, and the torch of the defendant in error was the only torch or light in the vicinity of the engine at the time of the accident, and being directly in front of the engineer made the negligence of plaintiff in error wholly inexcusable.

Transcript, pp. 12 to 25, 67.

ASSIGNMENT OF ERRORS.

The assignment of errors filed by plaintiff in error embraces seven alleged errors.

Transcript, pp. 71, 72.

The first and second assignments are too general to be considered.

Transcript, p. 71.

Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128, 132;

Stevens v. Gladding, 19 Howard 64.

All of the remaining errors assigned excepting the last one refer to the assignment of errors in the Circuit Court of Appeals.

Transcript, pp. 71, 72.

THIRD ASSIGNMENT OF ERROR.

The third assignment of error is:

> "Said Circuit Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause (Record, p. 64)."
>
> Transcript, p. 71.

The first assignment of error referred to is:

> "The verdict of the jury is without evidence to sustain it."
>
> Transcript, p. 57.

Learned counsel for plaintiff in error, in his brief filed in the Circuit Court of Appeals, abandoned the assignment of errors filed below and re-stated the alleged errors there urged in a different form and order, waiving several assignments altogether, as will partially appear from the opinion of the Circuit Court of Appeals.

Transcript, p. 67.

The error alleged in this third assignment was not urged below, and consequently the Circuit Court of appeals cannot be put in error for its failure to sustain an assignment never brought to that Court's attention.

Transcript, p. 67.

Aside from that, if this assignment had been considered and overruled by the Circuit Court of Appeals, it would have been manifestly proper as there was abundant evidence to support the verdict.

There were only three witnesses who testified as to the accident, viz: Defendant in error, H. A. Furbrash, and Engineer Hunter; Hunter alone testifying for plaintiff in error.

Transcript, pp. 12, 26, 32.

The witnesses for defendant in error testified to the facts as set forth in the statement of the case, *supra*.

Transcript, pp. 12 to 31.

The Circuit Court of Appeals found the facts as testified by the defendant in error.

Transcript, p. 67.

In fact, the testimony of defendant in error is not contradicted as to the manner in which accident occurred.

Engineer Hunter, the sole witness for plaintiff in error, touching the accident, testified THAT HE NEVER PAID ANY ATTENTION TO THE DEFENDANT IN ERROR, AND DOES NOT KNOW HOW HE GOT HURT.

Transcript, pp. 33, 35.

THAT HE DID NOT REMEMBER SEEING FIREMAN GADD ON THE FOOTBOARD OF THE ENGINE; THAT HE DID NOT REMEMBER SEEING HIM STEP OFF THE FOOTBOARD AND WALK BACK TOWARD THE

STEPS OF THE CAB; THAT HE DID NOT KNOW HOW HE GOT HURT; THAT THE FIRST HE KNEW OF THE ACCIDENT, GADD WAS LYING ON THE GROUND CRYING FOR HELP; THAT HE NEVER PAID ANY ATTENTION TO GADD.

Transcript, pp. 34, 35, 36.

The facts in this case were submitted to a jury to determine whether or not the plaintiff in error was guilty of negligence, and whether or not the defendant in error was guilty of contributory negligence.

Transcript, pp. 46, 47, 48.

The jury found that the facts established negligence on the part of the plaintiff in error, and that defendant in error was not guilty of contributory negligence.

Transcript, p. 9.

That decision of the facts is final, for this Court has said, in Richmond & Danville R. Co. v. Powers, 149 U. S. 43, 45:

> "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony or because the facts being undisputed fair-minded men will honestly draw different conclusions from them."

FOURTH ASSIGNMENT OF ERROR.

The fourth assignment of error is:

"Said Circuit Court of Appeals erred in not sustaining the fourth assignment of error upon the record in said cause, and particularly subdivision 1 and 3 thereof (Record, pp. 64-65)."

Transcript, p. 72.

This assignment below contained three subdivisions.

Transcript, p. 58.

Subdivision (1) of this assignment is:

"The Court erred in charging the jury:

(1) If you find the evidence introduced by the plaintiff to be true as to the manner in which he was injured, and if you find that the conduct, which that evidence discloses, on the part of the engineer in charge of the engine was negligence, then the defendant is liable to the plaintiff for his injuries.

The above was error because vague and indefinite and insufficient in its statement of what would be negligence; because the engineer was plaintiff's fellow servant; because it leaves out of consideration the circumstances surrounding the accident."

Transcript, p. 58.

The exceptions now urged to that instruction were never brought to the attention of the trial Judge, and were not urged in the Circuit Court of Appeals.

Transcript, p. 69.

In the trial court, counsel for plaintiff in error said:

"We further except to the statement made—

that the Court made to the jury—that if they believe the facts as stated by the plaintiff, which left out of the question the doctrine of assumed risk.

The Court: I understand that the doctrine of assumed risk is abolished by the Employer's Liability Act in so far as it relates to cases wherein the servant is injured because of the negligence of any of the officers, agents or employes, etc., of the carrier, and contributory negligence is modified so as that it no longer bars the right of action, but goes in reduction of the amount of recovery. But you reserve your exception."

Transcript, p. 50.

The error assigned in the brief filed for plaintiff in error in the Circuit Court of Appeals, and the one there urged, was based on the exception taken in the trial court, viz., that the instruction left out of consideration the doctrine of assumed risk.

Transcript, p. 69.

As the exception urged in this Court to the instruction of the trial court was never made at the trial, and, further, was not made in the Circuit Court of Appeals, it cannot be noticed here.

Phelps v. Mayer, 15 Howard 160;

Springer v. U. S., 102 U. S. 586;

Flournoy v. Lastraps, 131 U. S. CLXI, 25 Law Ed. 406.

But, if the instruction objected to was vague and indefinite, it was the duty of the counsel for plaintiff in error to specially request additional instruction

and not content himself with reserving exception to the charge.

Anthony v. L. & N. R. Co., 132 U. S. 172;

Mobile & Mont. Ry. Co. v. Jury, 111 U. S. 584, 596;

Texas & Pacific Ry. Co. v. Cody, 166 U. S. 606, 616;

Cinti. Tr. Co. v. Leach, 95 C. C. A. 48.

FOURTH ASSIGNMENT.

Subdivision (2).

Subdivision (2) of this assignment is directed against a charge of the Court relating to an alleged written statement procured from defendant in error by a claim agent of plaintiff in error within forty hours after the injury.

Transcript, p. 58.

This subdivision is not particularly urged in this Court, but I will give it a passing notice.

Transcript, p. 72.

The exception now made was not taken at the trial.

Transcript, p. 50.

If it had been properly made, no error could have resulted, as counsel for plaintiff in error requested a special instruction touching the very question, which special request was given in substance.

Transcript, p. 51.

This subdivision was likewise not urged in the Circuit Court of Appeals.

FOURTH ASSIGNMENT.

Subdivision (3).

Subdivision (3) of the fourth assignment of error is:

> "The Court instructs you, if you find from the evidence the plaintiff was directed by Engineer Hunter to get off the engine and examine the engine for defects, and that while said plaintiff was off by direction of Hunter, it was Hunter's duty to look out for plaintiff and not move the engine until he knew plaintiff was in a position of safety.
>
> The above placed on engineer the sole responsibility for plaintiff's safety and is an incorrect statement."
>
> Transcript, p. 58.

The sixth assignment is directed against the same charge, but for the following reasons, viz:

> "The above made the master an insurer, and he wholly eliminated any question of whether the master breached any duty he owed to the plaintiff except as an insurer."
>
> Transcript, pp. 72, 59.

The objection made to that instruction in the trial court was:

> "I WANT TO TAKE EXCEPTION TO THAT LAST STATEMENT ON THE GROUND THAT THE FACT THAT HE MOVED UP THAT ENGINE, IF HE WAS IN A PLACE OF SAFETY, IS NOT STATED TO BE ANY CAUSE OF ACTION IN THIS

CASE AND NOT INVOLVED IN THE PLEADINGS, AND HE WAS NOT INJURED BY VIRTUE OF IT."

Transcript, p. 49.

Quite a different objection from that urged in the Circuit Court of Appeals and assigned as error here.

The rule is now well established that only those matters can be assigned for error that were brought to the attention of the court below during the progress of the trial.

Springer v. U. S., 102 U. S. 586, 593;

Wood v. Weimar, 104 U. S. 786, 795;

Montana Ry. Co. v. Warren, 137 U. S. 348, 351.

The Circuit Court of Appeals in passing on the assignment now under consideration said:

"This instruction is here criticized as requiring actual knowledge on the part of the engineer that plaintiff was in a position of safety, instead of merely the exercise of ordinary care to that end. But the exception to this instruction did not raise the criticism in question, and we therefore cannot consider it. It is to be assumed that had the Court's attention been called to the criticism now urged, due correction would have been made."

Transcript, p. 69.

FIFTH ASSIGNMENT OF ERROR.

"Said Circuit Court of Appeals erred in not sustaining the fifth assignment of error upon

the record in said cause, and particularly subparagraph (a) thereof (Record, p. 65)."

Transcript, p. 72.

This fifth assignment contains five subdivisions directed against the action of the trial court in refusing to give instructions requested by counsel for plaintiff in error.

Transcript, pp. 58, 59.

Subdivision (a), which seems to be the only one that counsel for plaintiff in error desires to urge in this Court, is as follows:

"The Court erred in refusing to charge the jury as specially requested by the defendant and by the Court refused, as follows:

(*a*) If you believe that the plaintiff saw the engine slowly moving, and under such circumstances that the plaintiff saw or by reasonable care could have seen that a 'kicking switch' was about to be made, and that the plaintiff with a torch in his left hand stepped up on the cab and was caused to fall by reason of a 'kicking switch'—that is, a jerking motion of the engine usual in such switching operations—your verdict must be for defendant.

The above is a correct statement of the law and there was evidence to support it, and it was not given in the general charge, and the defendant was entitled to have the benefit of the instruction."

Transcript, p. 58.

In the first place, the instruction requested is an erroneous statement of law, as it makes the con-

tributory negligence of defendant in error under the Employer's Liability Act a bar to his recovery.

In the second place, there was no evidence on which to base such an instruction.

Requested instructions based upon an hypothesis which there is no evidence tending to support are properly refused.

> Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 76;
>
> Bird v. U. S., 187 U. S. 118, 132;
>
> Keyser v. Hitz, 133 U. S. 138.

Defendant in error testified on direct and cross-examination that the engine was not moving but standing still at the time he attempted to board it.

Transcript, pp. 14, 21.

Furbrash, the other witness for defendant in error, did not see him at the time he was injured, and does not testify that the engine was moving.

Transcript, pp. 28, 29.

Engineer Hunter, witness for plaintiff in error, testified that he never paid any attention to defendant in error and does not know how he got hurt.

Transcript, pp. 33, 35.

Not a witness testified that the engine was moving when defendant in error attempted to step on it.

An alleged written statement was introduced by

plaintiff in error, by which it was sought to show that defendant in error stated to one of its claim agents, who had called at the hospital for that purpose, that the engine was moving slowly when he undertook to board it.

Transcript, p. 23.

That alleged statement was obtained within forty hours after the accident, while defendant in error was lying flat of his back in the hospital, suffering intense pain.

Transcript, p. 25.

The amputation of Gadd's leg took place after 12 o'clock on the morning of April 26, 1911.

Transcript, p. 42.

The claim agent of plaintiff in error called at the hospital and wrote out the alleged statement about 3 p. m. on April 27th, 1911.

Transcript, p. 38.

Defendant in error testified that he did not read what the claim agent wrote; that he was not able to be disturbed; that he was suffering greatly and did not know what it was he signed; that he signed it to keep from being bothered.

Transcript, p. 23.

It was only in that alleged statement, procured at the time and in the manner set out, that there is any mention in the evidence that the engine was moving at the time defendant in error attempted to board it.

That alleged statement was evidence which alone went to the credibility of the witness and could not be received as evidence of any fact tending to prove the issue.

> "Such testimony of inconsistent statements is admissible only for the purpose of impeaching the credit of the witness, but cannot be received as evidence of any fact touching the issue to be tried; for that would be to substitute the statements of a witness, generally when not on oath as evidence between the parties, for his evidence given under the sanction of an oath upon the trial."
>
> Charlton v. Unis, 4 Gratt. 60.
>
> "It is no evidence whatever that the facts are as he formerly stated them; and though appeals are sometimes made to a jury that it is so, it is the province of the Court to inform them that it is not so."
>
> Gould v. Norfolk Lead Co., 9 Cush. 346.

That evidence was submitted to the jury under the proper instructions, but could not be made the basis of the instruction requested.

Transcript, pp. 47, 48, 51.

McDonald v. N. Y. C. & H. R. R. Co., 186 Mass. 474, 72 N. E. 55;

Donaldson v. N. Y. N. H. & H. R. Co., 188 Mass. 484, 74 N. E. 915;

Simms v. Forbes, 86 Miss. 412, 38 So. 546;

Dampman v. Penn. R. Co., 166 Pa. 520, 31 Atl. 244;

Wigmore on Evidence, Vol. II, p. 1180, Sec. 1018.

FIFTH ASSIGNMENT.

Subdivisions (b), (c) and (d).

Subdivisions (b), (c) and (d) of the fifth assignment of error complain of the trial court's refusal to give certain instructions to the effect that the contributory negligence of plaintiff would bar his recovery.

Transcript, p. 59.

The Employer's Liability Act under which this action was brought abolishes contributory negligence as a bar to a recovery, and authorizes the diminution of damages by the jury in proportion to the amount of negligence attributed to the employe.

Employer's Liability Act 1908, 35 Stat. 65, Ch. 149, as amended by Act 1910, 36 Stat. 291, Ch. 143;

Second Employer's Liability Cases, 223 U. S. 1.

Of the five alleged errors under the fifth assignment, only one, subdivision (a), was urged in the Circuit Court of Appeals, and that was properly overruled.

SIXTH ASSIGNMENT OF ERROR.

As stated above, this assignment is directed against the same instruction complained of in the

third subdivision of the fourth assignment, and there discussed.

Transcript, p. 72.

SEVENTH ASSIGNMENT OF ERROR.

> "Said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of said defendant in error for costs of suit in said Circuit Court of Appeals."

Transcript, p. 72.

The mere mention of which is all that is necessary to be said.

WRIT OF ERROR ISSUED AS A MATTER OF RIGHT.

The jurisdiction of the Federal courts in this case does not depend on the diversity of citizenship entirely, therefore the decision of the Circuit Court of Appeals is not final, and a writ of error issues as a matter of right, the matter in controversy exceeding $1,000.

Judicial Code, Sec. 241;

The Evarts Act, 26 Stat. at L. 826;

No. Pac. R. Co. v. Soderberg, 188 U. S. 526, 528.

The plaintiff in error does not invoke the judgment of this Court on any question involving the constitutionality of the Employer's Liability Act, nor a construction of it, and in such a case it was the purpose of the Judiciary Act of 1891 to submit

to the final jurisdiction of the Circuit Court of Appeals.

This is a case wherein the whole duty of this Court will be performed by giving to the record such examination and consideration as may be necessary to enable your Honors to determine whether plain error was committed by the Circuit Court of Appeals in any of the particulars complained of.

Chicago Junction Ry. Co. v. King, 222 U. S. 222, 224.

A consideration of the assignment of errors herein will disclose that neither plain nor other error has been committed.

An affirmance of the judgment of the Circuit Court of Appeals with damages, under rule 23 of this Court, is requested.

Respectfully submitted,

JOHN L. STOUT,
Attorney for Defendant in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

SOUTHERN RAILWAY COMPANY,

Plaintiff in Error.

vs.

No. 645.

W. O. GADD,

Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

The defendant in error, while employed by plaintiff in error as a fireman on a switch engine in its yards at Memphis, Tennessee, was injured by the switch engine running over his left leg.

The negligence complained of is set forth in the amended declaration, as follows:

> That while engaged in switching cars loaded with interstate freight "at about 10:30 on the night of April 25, 1911, plaintiff was directed by said engineer, Smith Hunter, who was at that time plaintiff's superior and in charge of

said engine and who had a right to direct and command this plaintiff in the performance of his duties, to make an inspection of the engine for the purpose of discovering and remedying a certain defect therein. That pursuant to the command and direction of Smith Hunter, plaintiff alighted from said engine at a place in the yards of the defendant in Memphis, Tennessee, between Madison and Monroe avenue, and while examining same, said engineer suddenly started the engine backward without warning to the plaintiff. Plaintiff thereupon stepped upon the footboard of the locomotive in question and rode until the engine again stopped, when plaintiff stepped off the footboard on the front of said engine and started walking towards the cab on the engineer's side for the purpose of boarding the engine and taking his proper place in the cab. Said engineer knew that plaintiff had been on said footboard, or by the exercise of ordinary care could have known it, and knew that plaintiff was at the time starting towards the cab for the purpose of resuming his regular place therein, and while the engine was standing still and just as plaintiff attempted to board the engine on engineer's side and had caught hold of the handholds provided for that purpose on the cab of the locomotive and on engineer's side and was in the act of stepping on the steps leading to the cab on said engineer's side, all of which was well known to said engineer, when said engineer, recklessly and negligently, suddenly applied the steam with full force, so that said engine was caused to jump or leap or jerk suddenly forward and with such suddenness and force as to throw plaintiff from his place on the steps of said cab, jerk loose his hold upon the handholds and throw him beneath the locomotive, with the result that the wheels of the loco-

motive passed over his left leg", etc. (Tr., pp. 2, 8).

It is admitted that at the time of the accident the switch engine was engaged in making up a train in interstate commerce (Tr., pp. 26, 31, 67).

ASSIGNMENT OF ERRORS.

The alleged errors set out in the brief filed for plaintiff in error are three in number, denominated by learned counsel "Specifications of Error" (Brief, pp. 10-11-12).

FIRST ASSIGNMENT OF ERROR.

The first assignment or specification of error is that there was no evidence on which to base a verdict, and motion for a peremptory instruction should have been granted (Brief, p. 10.)

There were only three witnesses who testified as to the accident,—defendant in error and Furbrash, for the plaintiff, and Engineer Smith Hunter, for the defendant.

THE EVIDENCE.

Defendant in error testified as follows:

That on April 25, 1911, he was in the employ of the Southern Railway Company, in Memphis, Tennessee, as a fireman on a switch engine; that the engineer was Smith Hunter; that he went to work that day about 7 p. m. (Tr., p. 12); that they went

to work switching cars, and about 10 o'clock, as they were going down hill, he noticed something wrong,—sparks flying from the driving wheel; that he called Engineer Hunter's attention to it; that they were about Vance street, and that Hunter said as soon as we get down the hill get down and see about it; that they went on down hill and got to Union street, when some friend of the engineer climbed on the engine, and they shoved on down and made a switch (Tr., p. 13); that after they got north of Monroe street bridge, Hunter said, "Grab your torch and see what that is"; that he got his torch and started down the fireman's side and before he got to the ground the engineer started the engine moving, and he got back into the cab and said, "I can't examine it if you don't stand still a minute", and that Hunter said, "Wait until we stop again." That when they again stopped he said, "Hunter, give me a chance and I will get down and see what this is"; that Hunter replied, "Hurry up." That he got the torch and got down on engineer's side and stepped to the driver, where he could see; that he was standing there looking under to see what the trouble was, but did not find out because Hunter started backward; that he stepped out of the way and, as the front footboard passed, he got on; that when engine stopped, that he stepped off the footboard and walked back to get in the cab, with torch burning all the time in plain view of the engineer; that just as he turned and made an effort to get on the engine, the engineer started the engine forward with a jerk; that he gave no signal, had no notification that the engine was going to move, and did not know the engine was go-

ing to move; that he was going to resume his position in the cab (Tr., p. 14). That his hands were jerked loose and he was thrown under the engine tank; that as soon as he fell he holloed, and the friend of the engineer, who was still on the engine, jumped off and ran to him (Tr., p. 15). That the engine was standing perfectly still when he attempted to board it; that it started off right at the time that he attempted or was in the act of boarding it, in plain view of the engineer (Tr., p. 21). That he was thrown by the sudden jerk; that he was not expecting the engine to move at all; that the movement of the engine was unusual at that time; that Smith Hunter had sent him off the engine to examine it, and never gave him an opportunity to get back where he belonged (Tr., p. 22).

TESTIMONY OF H. A. FURBRASH.

The testimony of H. A. Furbrash corroborates that of defendant in error. He testified he was a car inspector for Southern Railway and remembered the night Gadd was injured (Tr., p. 26). That a friend of Engineer Hunter was on the engine, and Hunter called him on the engine to make him acquainted with his friend, and said he wanted him to get his friend out on the train being made up; that the person on the engine was not an employe (Tr., p. 27). That he heard Hunter tell Gadd to get down, when they stopped, and see what the trouble was with the engine; that he got off just before the engine stopped; that Gadd got down on the engineer's side right after he did; that Gadd had a lighted torch and started toward the head of the

engine (Tr., p. 28). That Gadd was very near the front of the engine and was standing with one hand on the engine, and in the other he had his torch; that he was about two car lengths from the engine and had started to cross the track, and the engine started to kick a car; that what called his attention to the car being kicked was the fuss being made by the engine; that the engine had only one car, which was kicked, and in just a few seconds after the car was kicked he heard of Gadd's injury (Tr., p. 29). That he ran to Gadd and the engineer's friend had Gadd's head in his lap; that the last time he saw Gadd before the injury he was on the right side of the engine, on the engineer's side, and had his torch (Tr., p. 30).

PLAINTIFF IN ERROR'S WITNESS.

Engineer Hunter was the only witness for the plaintiff in error to testify about the accident.

The learned counsel for plaintiff in error would have you believe that Hunter was a paragon in devotion to duty; that he was as faultless as the famed son of Lancelot was chaste. The record, however, discloses a far different story.

He was violating rule 563 at the time of the accident in permitting his friend to be on the engine (Tr., p. 17), and this friend was standing right behind Hunter a short time before the accident (Tr., p. 28), which accounts for his failure to know anything about the accident.

He testified that he did not remember having any

friend on the engine (Tr., p. 32); that he was busy cutting the train, fixing the train up, making a few short switches, and the next time he NOTICED Gadd he was down on the ground and holloing to come there quick; that he never paid any attention to Gadd; that he was leaning outside the cab window (Tr., p. 33).

He does not deny seeing defendant in error on the front footboard of the engine. He testified that he did not think he saw him; that if he did, it had slipped his memory; that he kicked the car (Tr., p. 34). That he did not remember seeing the defendant in error get off the front footboard and walk back towards the steps; that he did not recollect anything about it; that the calling of Gadd was the first he knew of his being hurt; that he does not know how he got hurt (Tr., p. 35).

Learned counsel for plaintiff in error contends that Hunter owed no duty to defendant in error, his fireman, and should have obeyed the signal to kick the car regardless of the fireman, who, in obedience to the engineer's orders, was off the engine and was making an effort to regain his position in the cab in plain view of the engineer.

Yet Hunter testified that the rule of the company prohibited moving the engine while an employe was at work around the engine until signal is given, or the employe is notified that the engine was going to move (Tr., p. 36).

The plaintiff in error made it Hunter's duty to

exercise the utmost caution to avoid injury to Gadd (Tr., p. 19).

It clearly appears that the evidence introduced by defendant in error is not contradicted.

The trial Judge submitted the case to the jury to find whether or not the facts disclosed negligence on the part of the company (Tr., p. 46).

> "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 417; *B. & O. v. Griffith*, 159 U. S. 603; *T. & P. v. Gentry*, 163 U. S. 353, 368. A like doctrine was thus expressed by the Supreme Court of Pennsylvania in *Penn. Ry. Co. v. White*, 88 Pa. 327, 333, a case in many respects analogous to the present one:
>
> 'Negligence has been defined to be the absence of care according to the circumstances and is always a question for the jury when there is reasonable doubt as to the facts or as to the inferences to be drawn from them. When the measure of duty is ordinary and reasonable care and the degree of care varies according to circumstances, the question of negligence is necessarily for the jury.' "
>
> *Warner v. B. & O.*, 168 U. S. 339, 348.
>
> " 'What may be deemed ordinary care in one case', this Court has said, 'may under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury un-

der proper instructions from the Court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the Court.' *Grand Trunk v. Ives,* 144 U. S. 408, 417."

T. & P. v. Gentry, 163 U. S. 353, 368.

To same effect:

Sioux City & P. R. Co. v. Stout, 17 Wall. 657; *R. & D. R. Co. v. Powers,* 149 U. S. 43, 45.

In *Mason & O. Ry. Co. v. Yockey,* 103 Fed. 265, 266, the Circuit Court of Appeals, Sixth Circuit, speaking through Circuit Judge, now Mr. JUSTICE DAY, said:

"Should the Court have determined the case for the plaintiff in error as a matter of law, or was it properly left to the jury? A case can be properly withdrawn from the jury only where on a survey of the whole evidence and giving effect to every inference fairly or reasonably to be drawn from it, the case is palpably for the party asking a peremptory instruction. *Ins. Co. v. Thornton,* 100 Fed. 582. In *Railway v. Lowery,* 74 Fed. 463, the cases are fully reviewed and this Court, JUDGE LURTON giving the

> opinion, said: 'It is the duty of the Court, when a motion is made to direct a verdict, to take that view of the evidence most favorable to the party against whom it is desired that a verdict should be directed, and from the evidence and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for that party.' "

It is admitted by plaintiff in error that "the engineer owed defendant in error no duty to warn him that he was about to start the engine unless he knew or ought to have known that he was in a place of peril. * * * If the engineer was negligent in this behalf, then his act in starting the engine with a sudden and jerking movement may well be said to have been a negligent act, for which the plaintiff in error would be liable" (Brief, p. 4).

Can it not be fairly said that this record discloses the fact that the engineer knew or ought to have known that the defendant in error was in a place of peril when engineer started the engine?

The testimony of defendant in error was that he was directed by the engineer to leave the engine to examine same for defects, and was off the engine in obedience to the engineer's orders (Tr., p. 14).

And further, "He (Hunter) sent me down there, Mr. Ewing, to examine that engine, and never gave me an opportunity to get back where I belonged" (Tr., p. 22).

Furbrash, the other witness for defendant in error, testified:

"I heard Mr. Hunter tell Mr. Gadd to get down when they stopped and see what the trouble was with the engine."

I got off just before it stopped; it was pretty near standing still when I got off."

Q. Did Mr. Gadd get off after you did?

A. Yes, sir" (Tr., p. 28).

The defendant in error, therefore, was off the engine in obedience to the command of his engineer, and to say that he owed him no duty to look out for him and not to observe whether or not his fireman was in a place of peril before starting the engine in the manner he did, seems to me to be bordering on the absurd.

Engineer Hunter admitted that he did not observe even the slightest care toward the man who was obeying his orders. "I never paid any attention to him" (Tr., p. 33).

Furthermore, Hunter does not deny seeing Gadd get off the front of the engine and walk to the steps leading up to the cab.

"Q. And you saw Fireman Gadd get off the front of the engine and walk back towards the steps?

A. If I did, I don't remember.

Q. You do not recollect anything about it at all?

A. Not now; it has been quite a while ago" (Tr., p. 35).

Hunter testified further that he was leaning out

the cab window (Tr., p. 33). At that time defendant in error, with lighted torch, walked from the front of the engine to the cab steps, in plain view of the engineer, while the engine was standing still, and caught hold of the handholds to climb back into the cab to his place of duty, when, in utter disregard of his safety, Engineer Hunter started the engine with a sudden jerk, throwing him under the wheels.

Instead of there being no negligence, the conduct of the engineer smacks considerably of gross negligence.

Under that state of facts, can it be said that the Court erred in submitting the case to the jury?

SECOND ASSIGNMENT OF ERROR.

Under this assignment or specification of error, two instructions of the trial court are criticized (Brief, pp. 10, 11).

The trial Judge thus charged the jury:

> "If you believe the evidence introduced by the plaintiff to be true as to the manner in which he was injured, and if you believe that the conduct which that evidence discloses on the part of the engineer in charge of the engine was negligence, then the defendant is liable to the plaintiff for his injuries and unless the plaintiff was guilty of contributory negligence, he is entitled to recover whatever amount, under the sum for which he sued, that in your judgment would reasonably compensate him for the injury which he sustained" (Tr., p. 46).

The only exception taken to that instruction is as follows:

> "We further except to the statement made—that the Court made to the jury—that if they believe the facts as stated by the plaintiff, which left out of question the doctrine of assumed risk.
>
> The Court: I understand that the doctrine of assumed risk is abolished by the Employer's Liability Act, in so far as it relates to cases wherein the servant is injured because of the negligence of any of the officers, agents or employes, etc., of the carrier, and contributory negligence is modified so that it no longer bars the right of action, but goes in reduction of the amount of recovery. But you reserve your exception" (Tr., p. 50).

The evidence in this case discloses negligence, and there are no facts on which to base an instruction on assumption of risk.

The servant does not assume the risk of the employer's negligence in performing his duties.

> *Choctaw, O. & G. Ry. Co. v. McDade,* 191 U. S. 64, 68.

As the negligence of Hunter was the negligence of the plaintiff in error under the Employer's Liability Act, the defendant in error did not assume that risk.

But the trial Judge, did, in fact, charge the jury on assumed risk, as follows:

"If you do not believe the evidence of the plaintiff as to how this accident occurred, or, IF YOU DO BELIEVE WHAT HE SAID BUT DO NOT BELIEVE THAT THE ACTS OF THE ENGINEER, WHICH HE DESCRIBES, WERE NEGLIGENCE, WHICH CAUSED THE INJURY, THEN YOU SHOULD FIND FOR THE DEFENDANT" (Tr., p. 46).

In that instruction, the Court told the jury in effect that the plaintiff assumed the risk of the accident, if they believe the acts of the engineer did not constitute negligence.

Aside from that, it was the duty of plaintiff in error to request of the Court an instruction on assumption of risk, and omitting to do that, the exception is unavailing.

"But error cannot be imputed because the learned Judge omitted to instruct the jury on a particular aspect of the case, *however material*, unless his attention was called to it with a request to instruct upon it."

Mutual Life Ins. Co. v. Snyder, 3 Otto 393.

"We cannot regard as error the omission of the Court to give instructions which were not asked. In *Isaacs v. U. S.*, 159 U. S. 487, 491, Mr. JUSTICE BROWN said: 'It is no ground for reversal that the Court omitted to give instructions where they were not requested by the defendant. It is sufficient that the Court gave no erroneous instruction. *Pennock v. Dialogue*, 2 Pet. 1, 15; *T. & P. R. Co. v. Polk*, 151 U. S. 73, 78.' Nor are instructions which were given but

not excepted to subject to review. *Tucker v. U. S.*, 151 U. S. 170; *St. Clair v. U. S.*, 154 U. S. 134, 153."

Humes v. U. S., 170 U. S. 210, 211.

"If the charge does not go far enough, it is the privilege of counsel to call the attention of the Court to any question that had been omitted, and to request an instruction upon it, which, if not given, can be brought to the notice of this Court if an exception is taken. But the mere omission to charge the jury on some one of the points in a case, when it does not appear that the party feeling himself aggrieved made any request of the Court on the subject, cannot be assigned for error."

U. S. Express Co. v. Kountze, 8 Wall. 342, 354.

As plaintiff in error requested no instruction on assumption of risk, the failure of the trial court to so instruct, if such were the case, was not error.

Out of an abundance of caution, the trial court gave an instruction on contributory negligence, when, in fact, there was no evidence of contributory negligence on the part of defendant in error:

"So, if you find that the company was liable to him, your next inquiry should be, was the plaintiff, himself, guilty of any acts which contributed proximately to his injury. If you find that he was, then, the negligence upon his part would go in reduction of the damages to which he might be otherwise entitled in the proportion which his negligence bears to the negligence of the railroad company", etc. (Tr., p. 46).

The following instruction is also objected to, but for an entirely different reason from the one given in the trial court:

> "The Court instructs you that if you believe from the evidence that the plaintiff was directed by the engineer (Hunter) to get off the engine and examine the engine for defects, then while said plaintiff was obeying the direction of Hunter, it was Hunter's duty to look out for plaintiff and not to move the engine until he knew that plaintiff was in a position of safety" (Brief, p. 11).

The exception taken to that instruction in the trial court is as follows:

> "Mr. Ewing: I want to take exception to that last statement on the ground that the fact that he moved up that engine, if he was in a place of safety, is not stated to be any cause of action in this case, and not involved in the pleadings, and he was injured by virtue of it" (Tr., p. 49).

The objection to the instruction urged by plaintiff in error in the Circuit Court of Appeals, and again in this Court, is that

> "The above placed on the engineer the sole responsibility for plaintiff's safety" and "made the master an insurer" (Tr., pp. 58, 59, 72).

If the instruction based on the record in this case is objectionable, and the objection which is now urged to the instruction had been made in the trial court, it could have been remedied easily and made unobjectionable by adding the words "or by the exercise of ordinary care could have known."

The Circuit Court of Appeals, in considering this assignment, very properly said:

> "Complaint is made of an instruction that while the plaintiff was obeying the engineer's direction it was the latter's 'duty to look out for plaintiff, and not move the engine until the plaintiff was in a position of safety.' This instruction is here criticized as requiring actual knowledge on the part of the engineer that plaintiff was in a position of safety, instead of merely the exercise of ordinary care to that end. But the exception to this instruction did not raise the criticism in question, and we therefore cannot consider it. It is to be assumed that had the Court's attention been called to the criticism now urged, due correction would have been made" (Tr., p. 69).

> "Counsel were bound to present their point at the trial, so that the Court might consider it, and cannot, under a broad exception not aimed at it, upon subsequent search for error and finding it, bring it forward as a ground for reversing the judgment. It is a well settled rule that an exception in order to found a right to review must be sufficiently distinct to direct the attention of the Court to the particular error which is the subject of complaint. A challenge, which is aimless and points to nothing in particular, either in what is expressed or omitted, does not perform the object of an exception."

> *Coney Island Co. v. Denman* (6th Cir.), 149 Fed. 687, 692.

To same effect:

Davis v. Fredericks, 105 U. S. 4, 5;
Wood v. Weimar, 104 U. S. 786, 795.

Based on evidence introduced by plaintiff in error, the instruction given is not erroneous.

The following rule of plaintiff in error was introduced in evidence by it, viz:

> "Every employe must exercise the UTMOST caution to avoid injury to himself or to his fellows, especially in the switching of cars, and in all movements of trains * * *" (Tr., p. 19).

> "Where the rules of a railroad company require trackmen to use utmost caution and specify the precautions to be taken when rails are being removed, a failure by the trackmen to comply with the requirements of such rules will render the company liable for injuries resulting to trainmen from such failure, even where the trainmen have been notified to look out for the trackmen at a certain place; since the observance of the rules was required of the master in the performance of his absolute duty to the trainmen to furnish them a reasonably safe track."

> *Thompson on Negligence* (2nd Ed.), Sec. 4165.

> "Whether appellant was guilty of negligence or the deceased of contributory negligence are questions of fact for the jury, and the adoption of the rules above referred to is an admission by appellant that ordinary care required the course of conduct prescribed therein. *Ry. Co. v. Ward*, 135 Ill. 511, 26 N. E. 520. And the jury would have been justified in finding that if said rules had been obeyed the accident would not have happened. *Ry. Co. v. Ryan*, 165 Ill. 88, 46 N. E. 208"

C. & A. Ry. Co. v. Eaton (Ill.), 62 N. E. 785.

To same effect:

No. Pac. v. Mix (9th Cir.), 121 Fed. 476, 481;
L. N. A. & C. Ry. Co. v. Heck (Ind.), 50 N. E. 991;
Pidcock v. U. P. (Utah), 1 L. R. A. 132.

"Whatever may have been the correctness of the instruction as a general proposition, it was correct when applied to the case in hand. *Evanston v. Gunn*, 99 U. S. 660."

Spalding v. Castro, 153 U. S. 38, 39.

The instruction required no higher degree of care than the rules of the plaintiff in error required that Engineer Hunter should have exercised to avoid the injury to the defendant in error.

THIRD ASSIGNMENT OF ERROR.

Plaintiff in error complains of the decision of the Circuit Court of Appeals in not sustaining its fifth assignment, which was directed against the refusal of the trial court to give the following requested instruction:

"If you believe that the plaintiff saw the engine slowly moving and under such circumstances that the plaintiff saw or by reasonable care could have seen that a 'kicking switch' was about to be made, and that the plaintiff, with a torch in his left hand, stepped up on the cab step and was caused to fall by reason of a kicking switch—that is, a jerking motion of the en-

gine usual in such switching operations—your verdict must be for the defendant'' (Brief, p. 12).

The requested instruction is erroneous for several reasons, and the trial court rightly refused to give it to the jury.

In the first place, it makes the defendant in error assume the risk of the negligence of the engineer in starting the engine with a jerk at the time when he knew or should have known that the defendant in error was in the act of boarding the engine to resume his place in the cab. By giving that instruction, the Court would have, in effect, told the jury that the plaintiff in error was guilty of no negligence, and therefore the defendant in error cannot recover. Whereas, the jury, trial court, and Court of Appeals all agree that the plaintiff in error was guilty of negligence.

If the defendant in error saw, or by reasonable care could have seen, that a kicking switch was about to be made, and attempted to then board the engine, he would have been guilty of contributory negligence, which should have gone in mitigation of the damages and not in bar of a recovery.

This action was brought under the Employer's Liability Act, which abolished contributory negligence as a bar to recovery, consequently the instruction was an incorrect statement of the law.

If the facts assumed in the requested instruction were in evidence, it could not have rightly

been given to the jury, as the instruction makes the contributory negligence of defendant in error a bar to his recovery.

An instruction to the effect that the defendant in error could not recover would only be proper where the plaintiff in error was guilty of no negligence.

The Court gave an instruction on contributory negligence which correctly stated the law to the jury (Tr., p. 46).

In the second place, the requested instruction was based on an assumption of facts which were not in evidence.

It assumed that the engine was moving when defendant in error attempted to board it. There was no testimony given by any witness that the engine was moving at the time the defendant in error started to board it.

The defendant in error positively stated that the engine was standing still at the time he endeavored to get aboard it (Tr., pp. 21, 22).

Witness Furbrash testified that the last time he saw the engine before the accident it was standing still. He did not see the accident, but learned of it a few seconds after the kicking switch was made (Tr., p. 29).

Engineer Hunter did not see the accident, and does not know how the defendant in error was injured (Tr., p. 35).

These being the only witnesses who testified as to the accident, there was no evidence on which to base such an instruction, assuming it was a correct statement of law. The facts assumed in the requested instruction were not in evidence.

Furthermore, there was no evidence that the defendant in error saw, or by reasonable care could have seen, that a kicking switch was about to be made, and the requested instruction erroneously assumed those facts to exist.

Instructions to the jury not based upon any evidence are erroneous.

Keyser v. Hitz, 133 U. S. 138;
Mitchell v. Ins. Co., 183 U. S. 43, 49;
Wilmington v. Fulton, 205 U. S. 60, 77;
Northern Pac. v. Paine, 119 U. S. 561, 566;
Bird v. U. S., 187 U. S. 118, 132.

Respectfully submitted,

JOHN L. STOUT,

Attorney for Defendant in Error.

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Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

No. 645.

W. O. GADD,
Defendant in Error.

STATEMENT OF CASE, SPECIFICATIONS OF ERROR, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

CARUTHERS EWING,
Attorney for Southern Railway Co.

MEMPHIS LINOTYPE PRINTING CO.

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In the Supreme Court of the United States

OCTOBER TERM, 1913

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.

vs. No. 645.

W. O. GADD,
Defendant in Error.

STATEMENT OF THE CASE, SPECIFICATIONS OF ERROR, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

The motion of defendant in error to affirm the judgment of the Circuit Court of Appeals, Sixth Circuit, makes it necessary that this Court consider the merits of the case. To properly present the questions submitted for the Court's determination, it is requisite that the case be dealt with by plaintiff in error as though reached for trial on a regular call of the docket.

The learned attorney for defendant in error has so stated and presented the case that it is not believed that from his statements and presentation the Court can obtain any real conception of the questions arising on this record. His assertions as to what the record discloses are so much at war with the ideas entertained by the plaintiff in error that the matters to be determined will be presented as though no effort whatever had been made by him to state the case

(The page references made herein are to the printed transcript of the record in this Court.)

W. O. Gadd, defendant in error, was an engineer and fireman in the employ of the Southern Railway Company, plaintiff in error At the time of the injury he was acting as fireman with Smith Hunter, as engineer, on a switch engine engaged in making up an interstate train in the yards of the plaintiff in error at Memphis, Tennessee.

He sued under the Employers' Liability Act of April 22d, 1908 (35 Stat. at Large, 65 ch. 149), as amended by the Act of April 5th, 1910 (36 Stat. at Large, 291 ch. 143).

The trial judge held that said Employers' Liability Act abolished the defense of assumed risk, so that a construction of the act is here involved.

Defendant in error was injured by being thrown as he attempted to board the engine and his foot was caught under the wheels, necessitating amputation.

There was a judgment in his favor for $10,000.00 (Rec. p. 9), and the motion of plaintiff in error for a new trial being overruled, (Rec. p. 54), the case was carried to the Circuit Court of Appeals, Sixth Circuit, wherein errors were assigned, and on May 6th, 1913, the judgment of the lower court was affirmed, (Rec. p. 66), and the case is in this Court on writ of error by the Southern Railway Co., to review the said holding of the Circuit Court of Appeals.

The declaration, as amended, alleged that defendant in error was a fireman in the employ of plaintiff in error and, with others, was engaged in the handling of a switch engine in the yards of the company in making up an interstate train; that he had left the engine to look into a supposed defect about the front drive wheel, under direction of the engineer, and because the engine was set in motion before he had accomplished his purpose, he remounted the engine, and, when it again stopped, left

it to make the examination which had been interrupted by the prior movement of the engine.

Rec. pp. 1-2.

The declaration set out that after making the examination and finding the alleged defect of no consequence, the defendant in error walked back from the front of the engine, and on the engineer's side, to board said engine and enter the cab thereof, when he was injured by a sudden starting of the engine. The specific negligence attributed to the railroad company was thus stated:

> "Plaintiff caught hold of the hand-holds provided for that purpose on the cab of the locomotive and on the engineer's side, had stepped upon one of the steps leading to the cab, *all of which was well known to said engineer*, when said engineer recklessly and negligently suddenly applied the steam with full force, so that said engine was caused to jump or leap or jerk suddenly forward and with such suddenness and force as to throw plaintiff from his place on the steps of said cab, jerk loose his hold upon the hand-holds, and throw him beneath the locomotive."
>
> Rec. p. 2.

(The second count of the declaration cast the right to recover on the alleged negligence of the company in having "a rough, loose, unsafe and insecure place in the track," which defective track condition was said to have caused the engine to lurch and throw defendant in error. (Rec. p. 3.) This insistence was abandoned at the hearing, and only the alleged negligence of the engineer in starting the engine with a jerk, as plaintiff was entering the cab, was left in the case. Rec. p. 25.)

It will be observed that while the specific negligence averred was that the engine was caused to be suddenly started forward with a jerk at a time when it "was well known" to the engineer that defendant in error was about to board the car, it is proper to say that at the hearing it was not insisted that the engineer *knew* that defendant in error was in the act of boarding the engine when same was set in motion, but the sole right to recover was cast

upon the alleged negligence of the engineer in suddenly starting the engine without ascertaining whether defendant in error was about to board the engine.

It is quite important that this be made clear to the Court, that it may be understood what negligence was, at the trial, imputed to the engineer as the basis of a recovery by defendant in error.

When the defendant in error was being cross-examined with respect to the alleged defects in the track, (set out in Count 2 of the declaration), which subject had not been touched upon in his direct examination, the trial judge, evidently without knowledge of the allegations of the second count of the declaration, interrupted that cross-examination and the following colloquy between the Court and the attorney for the defendant in error took place:

> "The Court: There is no predicate made here for recovery on the imperfect condition of the engine?
>
> Mr. Stout: No, sir; just in regard to the negligence of the engineer *in not observing and taking notice of the fireman there and starting without warning.*"
>
> Rec. pp. 24-25.

So it is seen that the issue before the trial court and jury was whether the engineer was negligent "*in not observing and taking notice of the fireman,*" as the fireman, defendant in error, was undertaking to board the engine. The engineer owed defendant in error no duty to warn him that he was about to start the engine unless he knew or ought to have known that he was in a place of peril. The gravamen of defendant in error's case was the engineer's failure to observe his movements. If the engineer was negligent in this behalf, then his act in starting the engine with a sudden and jerking movement may well be said to have been a negligent act for which the plaintiff in error would be liable.

If, on the contrary, the engineer was not negligent in failing to observe and take notice of what the defendant in error was doing or proposing to do, then the plaintiff in error is not liable.

It might be well to say that it is not insisted that the starting of the engine with a sudden and jerking motion was a negligent manner of handling a switch engine engaged in the making up of a train, but the negligence is said to consist in the application of the steam, in form and manner as it was applied, at a time when the engineer was negligently ignorant of the purpose and effort of defendant in error to board the engine

This statement exhibits to the Court that the pivotal question was with respect to the obligation of the engineer, under the circumstances then existing, to have been "observing and taking notice of the fireman at the time when the power was suddenly applied to the engine.

The trial judge overlooked the real basis of asserted liability and in beginning his charge to the jury, thus stated the determinative question:

> "The act of carelessness and negligence that is alleged is that the engineer recklessly and negligently applied the steam to the engine with such suddenness and force as to throw the plaintiff beneath the locomotive with the result that the wheels of the locomotive passed over his left leg, necessitating an amputation thereof, just below the knee."
>
> Rec. p. 46.

The trial court, therefore, proceeded on the theory that the basis of asserted liability was the application of the steam to the engine with such suddenness and force as to throw the plaintiff, whereas, the real question at issue was whether the engineer was negligent in not knowing that the defendant in error was in a perilous position when this application of power was made. The statement of the trial court, however, would have been all

right if in the charge he had explained that the engineer's sudden application of power could only be negligence if the engineer knew or ought to have known that at the time of the application of such power the defendant in error was attempting to board the engine. He nowhere did this, and, in fact, utterly failed to state any rule of law with respect to the duty of the defendant in error in the matter of avoiding injury to himself or with respect to the obligation of the plaintiff in error to avoid inflicting injury on the defendant in error.

There was in the general charge no other than the meager statement that if the jury believed the defendant in error and believed that his evidence showed that the plaintiff in error was negligent, then there could be a recovery.

Rec. p. 46.

After making the foregoing statement the trial judge elaborated upon the weight to be attached to a statement which the defendant in error had signed shortly after the accident wherein he undertook to tell how it occurred, (all of which is immaterial here), and after this diversion said:

> "So that if you find after all this evidence has been considered by you, as I said in the beginning, and you believe that the testimony introduced here by the plaintiff touching the manner of this accident, and you believe that the conduct of the engineer in starting the train in that manner was negligence, then you will find for the plaintiff."

Rec. p. 48.

There will be found nothing in the above, (and the general charge gave no further instruction or information to the jury), except the submission to the jury of (1) the verity of the evidence of defendant in error, and (2) whether that evidence, if believed, indicated negligence on the part of the plaintiff in error.

The plaintiff in error sought, by special request hereafter noticed, to have the correct issue submitted to the jury, but before dealing therewith attention is called to the fact that at the request of defendant in error, the Court supplemented the general charge with an instruction to the jury that the engineer was guilty of negligence if he set the engine in motion without *knowing* that defendant in error was in a place of safety.

Rec. p. 49.

This charge was equivalent to a peremptory instruction in favor of defendant in error, as it made the engineer an insurer of his safety. In other words, it was required that the engineer *know* that defendant in error was in a position of safety before the engine was set in motion, whereas, his full duty was discharged if he exercised reasonable care in that behalf, assuming that any duty rested upon him at all, under the existing circumstances.

The special request which plaintiff in error submitted to the Court was framed in view of the undisputed evidence that it was usual and customary to make a kicking switch in making up a train, and the further undisputed evidence that it was obvious that a kicking switch was about to be made just at the time the defendant in error sought to board the engine. The idea of plaintiff in error was that the engineer had a right to presume that the defendant in error would not undertake to board the engine just as a kicking switch was to be made, because such an effort necessarily involved him in grave danger. To hold otherwise would be to require that the engineer presume that the defendant in error was about to do a negligent thing. Hence, plaintiff in error sought to have the Court inform the jury that if defendant in error sought to board the engine when a kicking switch was about to be made, there could be no recovery.

Rec. 51, Request No. 1.

The Court declined to give the above in charge to the jury.

It is proper to here place the Court in possession of the nature and extent of exceptions taken to the charge of the trial court:

No question is made as to a proper exception being reserved to the refusal of the trial court to instruct the jury as specially requested above, (Rec. p. 51), but the point is made that there was no proper exception taken to the charge of the Court that if the evidence of the defendant in error was believed and if the jury found that such evidence indicated negligence, there could not be a recovery, nor to the charge given, at the request of the defendant in error, to the effect that it was the duty of the engineer before moving the train to *know* that defendant in error was in a place of safety. The said special request was the last statement made by the trial judge to the jury and exception was reserved thereto in the following loose, rambling and awkward manner:

> "Mr. Ewing: I want to take exception to that last statement on the ground that the fact that he moved up that engine if he was in a place of safety is not stated to be any cause of action in this case, and not involved in the pleadings, and he was not injured by virtue of it. We further except to the statement made, that the Court made to the jury, that if they believe the facts as stated by the plaintiff, which left out of question the doctrine of assumed risk."
>
> Rep. pp. 49-50.

Thereupon the trial court, in response to this exception, said:

> "The Court: I understand that the doctrine of assumed risk is abolished by the Employer's Liability Act, in so far as it relates to cases wherein the servant is injured because of the negligence of any of the officers, agents or employes, etc., of the carrier

and contributory negligence is modified so as that it no longer bars the right of action, but goes in reduction of the amount of recovery. But you reserve your exception."

Rec. p. 50.

In reply to the suggestion of the trial court to the attorney for plaintiff in error that he reserve an exception, such exception was properly reserved.

Rec. p. 50.

In the general charge, as well as in the charge given at request of defendant in error, the Court made liability to depend, in the former, on the verity of the evidence of defendant in error; in the latter, the plaintiff in error absolutely liable under the proof, though neither proposition presented the real question at issue and both statements were clearly erroneous. Attention was called to the erroneous idea of the trial judge, as to the first proposition, by the statement that the Court's charge left out of question the doctrine of assumed risk. This was the ground of the exception reserved.

The charge which made the plaintiff in error absolutely liable unless the engineer "*knew*" that defendant in error was in a position of safety when the engine was suddenly moved, was excepted to as not being according to the theory of the defendant in error's case.

It should be further stated that, at the conclusion of all the evidence, the plaintiff in error moved the Court for a peremptory instruction in its favor, which motion was overruled by the trial court and exception duly reserved.

Rec. p. 45.

The effort has been to fully and distinctly state those matters which took place at the hearing with respect to which the judgment of this Court is invoked. Other questions were raised in the lower court and in the Circuit Court of Appeals, but they are not deemed of sufficient importance to be here urged. (*Railway Co. v. King,*

222 U. S. 222.) The learned attorney for defendant in error seems to entertain the idea that by not urging in this Court every question that was urged in the trial court and the Circuit Court of Appeals, the plaintiff in error waives the questions which are here insisted upon. The plaintiff in error does not intend by its silence on one question to waive propositions as to which it does not remain silent.

SPECIFICATIONS OF ERROR.

1.

There was no evidence on which to base a verdict in favor of defendant in error and the motion of plaintiff in error for a peremptory instruction in its favor should have been granted.

> Assignment of error No. 3 on Writ of Error to this Court, Rec. p. 71.
>
> Assignment of Error No. 1 in Circuit Court of Appeals, joining Nos. 1, (Rec. p. 57), and 9, (Rec. p. 60), as errors were assigned in trial court.

The Circuit Court of Appeals overruled this insistence, (Rec. p. 68), and that action of said court is assigned as error.

> Assignment of Errors, No. 1, sub. par. 2 of No. 2 and No. 3, on Writ of Error to this Court, Rec. p. 71.

This involves a discussion of the undisputed facts and the law applicable thereto, which is herewith submitted .

2.

The trial court charged the jury that the defendant in error could recover if the jury believed (1) the evidence of defendant in error and (2) believed that his evidence showed that plaintiff in error was negligent;

and also charged the jury, as specially requested by defendant in error, that it was negligence on the part of the engineer to move the train until he *knew* that defendant in error was in a place of safety.

> Assignment of Errors, Nos. 4 and 6, on Writ of Error to this Court, Rec. p. 72.
>
> Assignment of Error, No. 4 and 6, in Circuit Court of Appeals, embracing sub-divisions 1 and 3 or No. 4 as errors were assigned in trial court, Rec. p. 58.

The charge of the Court, in the statement of the law to control the jury, was simply as follows:

> "If you believe the evidence introduced by the plaintiff to be true as to the manner in which he was injured, and if you believe that the conduct which that evidence discloses on the part of the engineer in charge of the engine was negligence, then the defendant is liable."
>
> Rec. p. 46.

The charge given by the Court, at the special request of defendant in error, was as follows:

> "The Court instructs you that if you believe from the evidence that the plaintiff was directed by the engineer (Hunter) to get off the engine and examine the engine for defects, then while said plaintiff was obeying the direction of Hunter, it was Hunter's duty to look out for plaintiff and not move the engine until he knew that plaintiff was in a position of safety."
>
> Rec. p. 49.

Instructions, as embraced in the regular charge, submitted the case to the jury on the erroneous theory, (challenged at the trial by explicit exception, Rec. pp. 49-50), that the doctrine of assumed risk was abolished, and, as relates to the charge given at the request of defendant in error, the same was erroneous in that it made the engineer an insurer of the safety of defendant

in error, and was at war with the theory of the case as stated at the hearing, (challenged at the trial by explicit exception on the latter ground. Rec. p. 50).

The Circuit Court of Appeals overruled this insistence, (Rec. p. 69), and that action of said court is assigned as error.

Assignment of Error, No. 4, on Writ of Error to this Court, Rec. p. 72.

The propositions submitted by these specifications of error are hereafter fully discussed.

3.

The trial judge refused to charge, as specially requested by plaintiff in error, that the defendant in error could not recover if he made an effort to board the engine, as and when he saw, or negligently failed to see, that a kicking switch was about to be made and was thrown by the usual movement incident to the making of such kicking switch.

Assignment of Error, No. 5, on Writ of Error to this Court, Rec. p. 72.

Assignment of Error, No. 5, in Circuit Court of Appeals, based on subparagraph *a* of No. 5, as errors were assigned in trial court, Rec. p. 58.

The special request which the plaintiff in error sought to have given in charge to the jury was as follows:

"If you believe that the plaintiff saw the engine slowly moving and under such circumstances that the plaintiff saw or by reasonable care could have seen that a 'kicking switch' was about to be made, and that the plaintiff, with a torch in his left hand, stepped up on the cab step and was caused to fall by reason of a kicking switch; that is a jerking motion of the engine usual in such switching operations, your verdict must be for the defendant."

Rec. p. 51.

The Court declined to give this, though it involved the submission to the jury of the plaintiff in error's theory, to-wit, that, under the circumstances, the kicking switch was not negligence. The idea being that this was a movement necessary in the making up of a train in the yards of the company and, even though it was a sudden and jerking movement, that it was not negligence.

The Circuit Court of Appeals overruled the error assigned in that court as to this matter, (not specifically mentioning it, however. Rec. p. 70), and that action of said court is assigned as error.

Rec. p. 72.

The plaintiff in error was not negligent in making a kicking switch and if defendant in error sought to board the engine as one was being made and was thereby thrown, his misfortune is to be attributed to his own folly.

PROPOSITIONS OF FACT.

1. Prior to the injury to defendant in error sparks were seen flying from the drive wheel and the engineer told defendant in error to find out the cause thereof when the engine stopped. The engine stopped and defendant in error left the cab, but before he completed his examination, the engine was set in motion and he returned to the cab of the engine. The engine was again stopped and defendant in error left the cab to examine the drive wheel. The engine was again set in motion and defendant in error mounted the front footboard and rode thereon until the engine again stopped.

Rec. pp. 13, 14.

2. When the engine stopped the defendant in error left the footboard and walked back toward the cab of the engine, on the engineer's side. He was in plain view

of the engineer, that is, in a position where he could have been seen by the engineer. He carried a torch and, had the engineer been looking out for or looking toward him, he could have seen him.

Rec. pp. 14, 21, 22.

3. The engineer was handling a large cut of cars, (Rec. p. 23), and was leaning out of the cab window watching the switchmen, who were signaling him with respect to the necessary movements of the engine; the crew was engaged, in the yards of the company, in making up a train. Rec. p. 33.

4. In the course of making up trains the defendant in error was frequently out of the cab and on the ground and about the engine, (Rec. p. 36), and the engineer said that he was unaware that the defendant in error was out of the cab at this particular time.

Rec. pp. 33, 35.

5. When the defendant in error reached the step of the engine cab the engineer was preparing to kick a car, (Rec. p. 29). The engineer "was busy watching the switchmen," (Rec. p. 33), and, in obedience to a signal from the switchman, kicked a car.

Rec. p. 34.

6. The movement of the engine in kicking the car threw the defendant in error to the ground and his foot went under the wheel.

Rec. pp. 14, 29, 35.

7. The defendant in error was an experienced engineer and fireman and familiar with the requisite movement of an engine in kicking a car. He explained that this was done by giving "it a sudden start" and that he "knew all about that."

Rec. pp. 25, 20.

8. The sudden start or jerk which threw the plaintiff was the usual and ordinary movement of an engine in making a kicking switch.

Rec. pp. 21, 25, 34.

9. Defendant in error was in position to know that a kicking switch was about to be made; he knew the sudden and jerky motion attendant upon that character of switching; the engineer had his attention addressed to the work in hand; the engineer was watching the switchmen for signals; the engineer was not necessarily aware that the defendant in error was on the ground; the kicking switch was made in obedience to a signal given by a switchman; the movement of the engine at that time was the usual, customary and ordinary movement in making a kicking switch; the defendant in error was thrown because of his effort to board the engine at the moment when a kicking switch was made.

PROPOSITIONS OF LAW.

1. The fact of injury to a servant carries with it no presumption of negligence on the part of the master, under the circumstances of this case.

Tex., etc., R. R. Co. v. Barrett, 156 U. S. 617.
Patton v. Tex., etc., R. Co., 179 U. S. 658.
Looney v. Met. R. Co., 200 U. S. 480.
LaBatt's Master & Servant, (2d Ed.), Art. 1604, p. 4898.
Great Northern Ry. Co. v. Johnson, 176 Fed. 328.
Midland Valley R. Co. v. Fulgham, 181 Fed. 91.

2. A master is not an insurer of the safety of his servants, but must exercise reasonable care to protect them from injury.

Hough v. T. & P. R. R. Co., 100 U. S. 213.
W. & G. R. Co. v. McDade, 135 U. S. 554.

U. P. Ry. Co. v. O'Brien, 161 U. S. 451.
C. O. & G. R. Co. v. Tennessee, 191 U. S. 326.
M. & O. v. Yockey, 103 Fed. 265.
Sandige v. A. T. & S. F. R. R. Co., 193 Fed. 867.
Narramore v. C. C. C. & St. L. R. R. Co., 96 Fed. 298.
Maue v. Erie R. R. Co., 198 N. Y. 221.
Lancaster v. A. T. & S. F. R. R. Co., (Mo.), 127 S. W. 607.
I. & G. N. R. R. Co. v. Schubert, (Tex), 130 S. W. 708.
White on Personal Injuries on Railroads, Art. 251.

3. Making a kicking switch, in the usual and customary manner, even though it involves a sudden movement of an engine, with a jerk or snap, is not negligence.

Randall v. B. & O. R. R. Co., 109 U. S. 478.
C. M., etc., R. R. v. Voelker, 129 Fed. 532.
Olds v. R. R. Co., 178 Mass. 73
Worcester v. Ry. Co., (Tex.), 91 S. W. R. 339.
Davis v. B. & O. R. R. Co., 152 Pa. 314.
Skinner, Admr., v. Cen. Vt. R. R. Co., 73 Vt. 336.
Dumas v. Stone, 65 Vt. 442.
Guffey v. H. & St. J. Ry. Co., 53 Mo. App., 462.
Hedrick v. Mo. Pac. Ry. Co., 195 Mo. 104.
C. & A. R. R. Co. v. Arnol, 144 Ill. 261.
Cen. R. R., etc., Co. v. Sims, 80 Ga. 749.
S. W. Tel. Co. v. Woughter, 56 Ark. 206.
Rutledge v. Mo. Pac. Ry. Co., 110 Mo. 312.
Youll v. S. C. & P. Ry. Co., 66 Ia. 346.
Hunt v. Hurd, 98 Fed. 683.
L. & N. R. R. Co. v. Smith, 129 Ala. 553.
Carr v. St. Clair Tunnel Co., 131 Mich. 392.
White on Personal Injuries on Railroads, Art. 330, 331.
Allen v. A. C. L. R. Co., 49 A. & E. R. R. Cas., (N. S.), 576.
Schaible v. L. S. & M. R. R. Co., (Mich.), 21 L. R. A. 660.

4. The failure of the engineer to observe and take notice of the defendant in error, under the circumstances, was not actionable negligence because the engineer owed the defendant in error no duty to keep watch and ward over him. A proper discharge of his duties, as engineer, made it impossible that he could keep track of the movements of the fireman.

C. C. C. & St. L. Ry. Co. v. Ballentine, 84 Fed. 933, 937.
Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 401.
Savings Bank v. Ward, 100 U. S. 195, 202.
Aerkfetz v. Humphreys, 145 U. S. 418.
Bottum's Admr. v. Hawks, 84 Vt. 370.
Cook v. Rice Lake Milling Co., 146 Wis. 535.
White on Personal Injuries on Railroads, Vol. 1, Art. 19, 322.

5. There is no conflict in the evidence sufficient to carry the case to the jury on the question whether the engineer did or did not see defendant in error while he was on the ground and about the steps of the engine cab. Evidence that defendant in error was there to be seen and had a torch which would have made him visible to anyone looking for him, or whose duty it was to look for him, does not create a conflict with the affirmative statement of the engineer that he did not see him and did not know he was there, especially when the engineer explains why he did not see him and why he did not know he was there. And the case of defendant in error was stated, at the trial, as based on the proposition that the engineer did not see him.

Rec. pp. 24-25.

B. & O. R. R. Co. v. Baldwin, 144 Fed. 53.
McMillan v. Grand Trunk Ry. Co., 130 Fed. 827.

6. A party will not be permitted to take one position at the trial and demand a judgment or verdict based thereon and, thereafter and in the appellate court, be heard to assert that what he stated at the hearing as the determinative question was not the real basis of his claim.

N. Y., Lake Erie & W. Ry. Co. v. Estill, 147 U. S. 591.
Badger v. Ranlett, 106 U. S. 255.
San Juan Light Co. v. Requena, 224 U. S. 89.

7. The defense of assumed risk was not abolished by the Employers' Liability Act, except to the extent that the employe does not assume the risk of his employment where the violation by the carrier of a statute enacted for the safety of the employe caused or contributed to his injury. The act does not affect the doctrine of assumption of risk as it relates to the ordinary and usual hazards of the master's service.

Bowers v. R. R. Co., (Ga.), 73 S. E. R. 677.
Freeman v. Powell, (Tex.), 144 S. W. 1033.
Parker v. Pac., etc., R. R. Co., (Kans.), 129 Pac. Rep., 1151.
Hall v. Vandalia R. R. Co., 169 Ill., App. 12.
Neal v. Idaho, etc., R. R. Co., 22 Idaho 74, 125 Pac. Rep. 331.

Authorities recognizing the existence of the defense of assumption of risks are:

Seaboard Air Line v. Moore, 228 U. S. 433.
Amer. R. R. Co. v. Birch, 224 U. S. 547.
Cen. R. Co. v. Colasurdo, 192 Fed. 901.
Sandige v. A. T. & S. F. Ry. Co., 193 Fed. 867.

While the defense of contributory negligence was abolished, the defense of assumption of risk was, by Section 4 of the act, left unimpaired, except in cases based on violation of statutory duty.

There is a wide distinction between contributory negligence and assumption of risk, the question of assumption of risk being quite apart from that of contributory negligence.

Schlemmer v. Buffalo, etc., Ry. Co., 220 U. S. 590, 596.
R. R. v. McDade, 191 U. S. 68.
Tuttle v. Ry. Co., 122 U. S. 189.
Sou. Pac. Ry. Co. v. Seley, 152 U. S. 145.

ARGUMENT.

It is clear that the learned district judge erred in his construction of the Employers' Liability Act. His holding that the first section abolished the doctrine of assumed risk is unsound. If it places the employe in the class of a stranger invited upon the carrier's premises for the transaction of business, the defense of contributory negligence and *volenti non injuria* would remain. The law makers knew this, and, in section three, provided that contributory negligence should not go in bar, but in mitigation. The common law rule as to this defense was abolished. If it was necessary to enact section three in order to change the law as to contributory negligence, was it not also necessary to provide against the defense of assumed risk? Congress so thought and acted. Congress knew that contributory negligence and assumption of risk were distinct defenses. Assumption of risk had been specifically dealt with in the Safety Appliance Act. So congress enacted section four to deal with this question. What was said? That assumption of risk should not apply or be available as a defense? No. What was said was this:

> "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe should not

> be held to have assumed the risks of his employment *in any case where the violation by such a common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.*" (Sec. 4, Employers' Liability Act of 1908.)

The subject of assumption of risk was in mind and the law-making power limited the operation and effect of the section to the case specified. Surely, if words are to be construed according to their ordinary meaning, this contention must prevail. The courts have "no enlarging or dispensing" power as to this act. Congress alone can legislate and it has done so, saying that the defense is abrogated in the case stated, but not otherwise.

The decisions of the courts of England and of Massachusetts, Alabama, Indiana, Arkansas, New York and Wisconsin, construing cognate statutes, are persuasive; and these courts had spoken before this law was passed.

> *Thomas v. Quartermaine L. R. Ap.*, Q. B. Div. 685.
> *Birmingham Ry. & Elec. Co. v. Allen*, 99 Ala. 359.
> *Tenanty v. Boston Mfg. Co.*, 170 Mass. 323.
> *Mellor v. Merchants Mfg. Co.*, 150 Mass. 362.
> *Amer. Rolling Mill Co. v. Hullinger*, 161 Ind. 673.
> *St. L. I. M. & Sou. Ry. v. Ledford*, 90 Ark. 543.
> *Andrews v. Ry. Co.*, 96 Wis. 348.
> *Gombert v. McKay*, 201 N. Y. 27.

If the case was tried below on an erroneous theory as to what defenses were open to plaintiff in error, or as to what train movements were negligent, as contradistinguished from the usual and customary movements in making up a train, it is clear that the rights of plaintiff in error were prejudiced and that the verdict should be set aside.

By the undisputed evidence it was shown that the particular switching operation then being made could not have been made except by moving the engine suddenly

and with a jerk, and that the defendant in error understood and knew that it was necessary that the engine be so handled, when about to kick a car.

Rec. pp. 20-21.

It was shown by the undisputed evidence that the defendant in error was injured in an effort to board the cab of an engine just as it was obvious that a switching movement was about to be made. That is to say, there was no dispute that the movement made when defendant in error was thrown to the ground was a sudden movement, necessary in making a kicking switch.

Rec. 29.

The proposition on which plaintiff in error relies is that it is not negligence for an engine to be operated in the usual and customary way that engines are handled in making up a train in the yards of the company. If this be sound, then the sudden jerking of the engine, or starting it with a snap movement was not a negligent act, nothing else appearing.

The jerking and handling of a train in the usual and ordinary way, under the circumstances attending the jerking and handling of the train which injured the defendant in error, cannot be said to be negligence.

(She authorities cited under *third* proposition of law, *supra.*)

A review of a few of the cases will illustrate the proposition.

In the *Youll* case, *supra,* the plaintiff, a brakeman, was injured in the making of a "flying switch." The plaintiff in that case was on the ground and walked along beside the train and boarded it just before the "flying switch" was about to be made. The Court held that the plaintiff knew that a "flying switch" might be made at or about the time he was getting on the car, and that the company was not negligent in thus handling the cars in this switching operation. In the opinion of the Court,

it is said that "such switches were frequently made by the employes on defendant's road and the plaintiff participated and aided therein without objection," and it was said that "the defendant cannot be held liable for an accident which occurred under such circumstances."

In the *Rutledge* case, *supra*, it appeared that the plaintiff was a switchman and was injured in the yards of the railroad company by being thrown by an unexpected and sudden movement of the train. The Court held that, while negligence might be predicated on a failure to promulgate proper rules in regard to the movement of trains in the yards of the company, still, it was said:

> "On the other hand, if the sudden movement was the result alone of the ordinary operation of the train going onto the switch, plaintiff must be held to have assumed the risk of being thrown off of the car by it and, therefore, cannot recover. This is one of the risks of the employment which the law holds that he Assumed when he engaged to perform the work assigned him. He mounted the car while in motion, and he knew it was going in on the switch, and, hence, he should have taken proper precaution against the ordinary movement of the train."

In *Cen. R. R. v. Sims*, *supra*, it appeared that the plaintiff, a train hand, was thrown from a car because "the engine gave the train a big jerk." The Court held that plaintiff could not recover, saying:

> "We think that such jerks upon a train of that character must be expected to occur, and that the risk of employment embraces it * * * and we think that under the evidence in this case there was nothing unusual in the management of this train, and that the injury that resulted to the plaintiff below was simply an occurrence that took place in the ordinary course of business."

In the *Guffey* case, *supra*, a passenger was injured by the sudden stoppage of the train. There was a sudden and violent jolt or jerk sufficient to throw one of the brakemen against the plaintiff, knocking her down, and it was for the injury thus received that she sued. There was evidence "that it was rather an unusual jar," and also, "that it was more violent than common on freight trains," and that it was a "heap harder than usual." This was a freight train, which carried passengers in the caboose. The Court held that a railroad company, assuming to carry passengers on freight trains, was bound to exercise the same degree of care as is required in the operation of passenger trains, "the difference being that the passenger submits himself to the inconvenience and danger necessarily attending that mode of conveyance." The Court stated that it might be fairly assumed as a fact within common knowledge "that there is more or less of violent jolting and jerking" incident to the movement of freight trains. It was thereupon well said:

> "It is well settled that negligence cannot be presumed when nothing is done out of the usual course of business, unless the course is improper * * * There is nothing in the record to indicate that there was any act or any omission not incident to the common usage of the road, or indicating fault. * * * It has been said that when something unusual occurs which injures plaintiff, but such unusual occurrence is not even inferentially the result of an unusual act of the defendant and the defendant has, so far as he is concerned, been pursuing his usual course which has heretofore been done in safety, then the unusual occurrence is what is called an accident. *Abbott v. Freeman*, 35 L. T. N. S. 783."

In *Chicago, etc., v. Voelker*, *supra*, the plaintiff was injured by a "kicking switch." It was shown that it was the custom to make these kicking switches. The trial court, though requested, refused to instruct the jury that

if it was the general and usual custom to kick cars to a fieldman without giving any notice and the plaintiff remained in the company's service understanding this custom, he assumed "the risk arising from this manner of kicking cars," and the Court held that the requested instruction should have been given. Voelker had been injured by assuming a position of exposure to injury, and was so situated that he might be thrown, and the Court said:

> "He would be primarily in a place of safety, would know that the work in which he was engaged was, in a large degree, that of moving cars and making up trains, and, being in control of his movements, would not assume a position of danger without some volition of his own. If, in the performance and during the observance of a general and uniform custom of the character stated, Voelker continued in the service of defendant, he assumed the risk of injury arising from its observance."

In the case at bar, the trial judge, all through the hearing, understood that making a kicking switch was negligent, *i. e.* that the sudden jerk was, of itself, a thing which should not have been caused. At the close of the case he made plaintiff in error an insurer of the safety of defendant in error.

There was no direct evidence that the engineer saw the defendant in error. The engineer testified that he did not see him.

Rec. pp. 33, 35.

It is a matter of common knowledge that the engineer sits in a cab considerably above the ground and far above the head of any individual passing along beside the engine. This engineer was making up a train in the night time, in the yards of the company. His attention was directed to the men whose signals he was obeying. He may have seen the defendant in error as he was walking

from the footboard toward the cab, and he may have seen him as he was examining the engine. The defendant in error could easily have been in plain view of the engineer, *i. e.*, where he could have been seen, and yet the engineer not have seen him. Whether the engineer saw him depends entirely upon where he was looking. The engineer's undisputed evidence is that he was not looking toward or at the defendant in error, but toward others.

While the right to recover was cast on the idea that the engineer negligently *failed to see* the defendant in error, the trial court dealt with the case as though the right to recover was cast on the idea that the engineer saw the defendant in error and the Circuit Court of Appeals fell into the same error and said, with respect to this proposition:

> "The contention that the engineer is not shown to have seen plaintiff is answered by the fact that there was express testimony not only that plaintiff was in plain view of the engineer, and with a torch in his hand, but that no reason existed why the engineer should not have seen him."
>
> Rec. p. 69.

The defendant in error did not predicate his right to a recovery on the proposition that the engineer saw him about to board the engine; and the Circuit Court of Appeals erred in concluding "that no reason existed why the engineer should not have seen him." There was a perfectly good reason why the engineer did not see him. The engineer was watching the switchmen for signals, and his attention was addressed to the switching movements he was there to make.

But the right to recover was based on the idea that the engineer, in the exercise of reasonable care, ought to have seen the defendant in error.

This involves the idea that the engineer negligently failed to see the defendant in error, when, in the exercise

of due care, he should have seen him. This amounts to a concession that the engineer did not see him. Therefore, the basis of the judgment of the Circuit Court of Appeals fails.

The negligent failure of the engineer to see the defendant in error is quite apart from the negligent or willfull operation of the train if he did see him. The case was submitted to the jury, as already shown, on the theory that the plaintiff in error's engineer saw the defendant in error, though it was distinctly avowed in the trial court that this was not the basis of the recovery sought and was not the negligence relied on by the defendant in error.

It is not out of place to repeat what took place during the trial:

> "The Court: There is no predicate made here for recovery on the imperfect condition of the engine?
>
> Mr. Stout: No, sir; just in regard to the negligence of the engineer in not observing and taking notice of the fireman there and starting without warning." Rec. pp. 24-25.

The question then recurs, what ought the engineer, in the exercise of reasonable care, to have known? The engineer was negligent in this behalf only upon the theory that he owed a duty to the defendant in error to ascertain and know the whereabouts of defendant in error before the engine was moved. It may be conceded that it was the duty of the engineer to see and know that the defendant in error was not in front of the engine nor in a position where the engine would run over him. If he saw him on the ground, he had a right to presume that he knew what the engineer was about to do, because it was obvious; and he was not bound to presume that the defendant in error would undertake to board the engine while it was in the act of making a kicking switch. The

defendant in error knew all about the kicking of a car because he had himself operated a switch engine in the yards of the company.

Rec. p. 25.

The defendant in error testified that he had had large experience working in the yards of the company, and fully understood the method of breaking up trains, etc.:

> "Q. You were a fireman and an engineer and knew all about that? About the method of breaking up trains and starting them?
>
> A. Yes, sir; kicking them and such like."

Rec. p. 20.

Was the engineer under obligation to find out whether the defendant in error was trying to board the cab of the engine just as a kicking switch was about to be made?

If so, the liability is absolute. If not, there is no liability.

It is submitted that it was not negligence on the part of the engineer to presume that the defendant in error would not undertake to board the engine just as a kicking switch was about to be made. The defendant in error had no more right to presume that the engineer would look out for him, than had the engineer the right to presume that the defendant in error would look out for himself.

To hold that the engineer was bound to know that the defendant in error would undertake to board the engine just as it was about to make a kicking switch, is to hold that the engineer was bound to know that he would do a foolish and negligent thing. He was required to indulge no such presumption. He was entitled to presume that the defendant in error knew what was about to be done, because what was about to be done was obvious to any experienced railroad man.

Rec. p. 29.

Had the defendant in error taken note of his surroundings he would have seen and known what the engineer was proposing to do, whereas, it could not have been known to the engineer what the defendant in error was proposing to do, unless the engineer had seen him in the act of doing it. The theory of the defendant in error's case, as stated by his attorney below, was that the engineer did not know what he was proposing to do and negligence was said to repose in the engineer's ignorance of the purposes of the defendant in error. Defendant in error gave no signal to the engineer and made no statement to him with respect to his purpose to board the engine. He knew that the engineer was directing his attention to necessary switching operations. The engineer knew that the defendant in error was on the ground and in a place of safety, according to the defendant's in error's evidence. According to the engineer's evidence, he was unaware that the defendant in error had left the engine for the second time and believed that he was still in the cab of the engine.

Rec. p. 33.

What legal duty rested on the engineer which required him to know that the defendant in error was about to board the engine at this time? Nothing, it is respectfully submitted, except the bare fact that the defendant in error was on the ground, which fact was, according to the engineer, unknown to him. If no legal duty rested on him to know the fact, his ignorance thereof was not negligence.

Assume, however, that the engineer knew that the defendant in error was on the ground, then he must have known that he had been on the front footboard of the engine until it stopped and that he had then left the footboard and was walking beside the engine and toward the engine cab. He could have known nothing else, even if he had seen him up to the very second when he under-

took to mount the engine. At that particular and exact moment the engineer was making, or was about to make a kicking switch, which required his attention to be addressed to the engine movement, rather than to what was taking place behind him and beneath him.

If the engineer saw all that was to be seen and knew all that was to be known up to the very second that the defendant in error undertook to board the engine, all that he could have seen and all that he could have known was that the defendant in error was on the ground and in a place of safety. Unless the engineer saw the defendant in error in the act of boarding, or about to board the engine, he could not have expected or suspected that he would do so, just as a kicking switch was about to be made. Having no right or reason to anticipate that the defendant in error would undertake to mount the engine just as a kicking switch was about to be made, the engineer was free from negligence in not anticipating that action on his part.

When a liability resting upon actual knowledge of the engineer, as alleged in the declaration and as found by the Circuit Court of Appeals, is eliminated, as it must be on the statement of the defendant in error's attorney at the trial, nothing is left of the defendant in error's case, except that the engineer ought to have anticipated that defendant in error would undertake to board the engine just as it was in the act of making a kicking switch.

The defendant in error asserts that the engineer was negligent in failing to anticipate what he was about to do, though this was not obvious, and at the same time asserts that he was free from negligence in failing to anticipate what the engineer was about to do, though this was obvious. The engineer could not be said to have acted negligently in failing to anticipate that the defendant in error would undertake to board the engine at that particular moment unless he saw that he was about to make that

effort. Yet this is the gravamen of defendant in error's case. An engineer, seeing a fireman walking beside an engine, even though he was walking toward the engine cab, would never presume that he was going to make an effort to board the engine at a time when it must have been obvious to him that a kicking switch was about to be made.

The defendant in error had a much better opportunity to know what the engineer was about to do than the engineer had to know what the defendant in error was about to do. The engineer had attached to his engine five or six cars, (Rec. p. 36), and had backed over the switch and was watching the switchmen so as to move the engine and train on their signal:

> "Q. And after that you backed over the switch —you got a signal from one of the switchmen to kick a car?
>
> A. Yes, sir.
>
> Q. And you obeyed the signal?
>
> A. Sure."
>
> Rec. p. 34.

The engineer testified that "as a general thing the fireman is up and down on the ground often," (Rec. p. 36), and there was no contradiction of this evidence.

The net result is, as defendant in error's attorney stated below, the right to recover must be predicated on "the negligence of the engineer in not observing and taking notice of the fireman." (Rec. p. 25.) If this be a sufficient basis for a recovery it must be that some duty rested on the engineer to observe and take notice of the defendant in error and that the engineer failed in this duty. It may be, and doubtless is, the duty of the engineer to see or exercise reasonable care to see that no one is in front of the engine or train which he is handling

and moving about, (*N. & W. R. R. v. Earnest*, 229 U. S. 114), but to say that it is the duty of the engineer to observe and take notice of the fireman when he is on the side of the engine or about it, is to say that the engineer could not possibly discharge the duties he was employed and expected to perform. He owes no more duty to the fireman than to any other servant of the company or to any other person who may have business or be about the train or engine. A train could not be made up in the yards of a railroad company if the engineer had to observe and take notice of the fireman every time he was on the ground and away from or along-side of the engine. As shown above by the undisputed evidence, the fireman is often on the ground in making up and breaking up trains in the yards, and, in making these switching movements in the yards of a railroad company, the engineer can only look the way the train or cars are being moved. It is necessary that he steadily watch in front of the engine or cars which are being handled. He has to do this in order to avoid running over men who are properly about the yards and engaged in the common enterprise with him. He has to do this to avoid collisions and tearing up cars in switching same about the yards in making up a train. He has to always know when to stop and when to start to prevent the engine or train or cars from being demolished. It would be utterly impossible for him to steadfastly and continuously observe and take notice of what the fireman did and where he went after he left the engine, and, at least, when he was away from the front of the engine or cars and not in a position to be run over or injured by a backward or forward movement. But, as above stated, even if the engineer was obliged to observe and take notice of the fireman every time he was on the ground, still, had the engineer in this particular case observed and taken notice of the fireman, he would not

have observed or been made acquainted with anything which would have informed him of the purpose of the fireman to mount the engine just as a kicking switch was about to be made. The fireman knew what the engineer was proposing to do, or, at least, what the engineer was there to do. He knew why the cut of cars had been backed across and over the switch. He knew there were switchmen up the track who were there to give signals as to when the engineer should move and what the character of the movement should be. The engineer had a right to presume that the fireman would look out for these things. It was not negligence on his part to fail to anticipate the particular act on the part of the defendant in error which resulted in his injury. If it was negligence, the burden of averting injury to the fireman rested alone on the engineer.

To entitle the defendant in error to recover, it is not enough to show an accident and an injury (*Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 176), but the evidence must go further and show a breach of duty owed to him by the master.

Assuming that the engineer, in the operation of the train, represented the master, then what duty did the engineer owe to the fireman which was breached and which caused the latter to be injured. The fact that defendant in error fell or was thrown carries with it no presumption of negligence on the part of the defendant company.

Negligence has relation to the circumstances in which one is placed and what an ordinarily prudent man would do or omit in such circumstances.

Charnock v. T. & P. R. R. Co., 194 U. S. 432.

Would an ordinary prudent man, acting as engineer in the making up of a train in the yards of a railroad company, expect that an experienced fireman, (familiar with the movements of the train and knowing what the train was doing at the time), would attempt to board an engine when it was obviously about to make a kicking switch?

If the engineer's statement be accepted, then he was guilty of not the slightest negligence. If the defendant in error's statement be accepted, the engineer was guilty of no negligence except and unless it was his duty to presume that the fireman, (the defendant in error), would undertake to board the engine at a time when a kicking switch was about to be or was being made. The engineer had no right to so presume, except it be that he was charged with knowing what was in the fireman's mind, or charged with knowing that a fireman on the ground would undertake to board the engine at a time when to do so was obviously reckless.

It is not believed that the engineer was required to indulge the presumption that the defendant in error would undertake to do that which was obviously a hazardous thing to do. In the first place, the engineer was entitled to presume that the fireman saw what was about to be done and knew the character of movement required in the doing. The fireman knew that the engineer was operating the engine and giving attention to the signals of those engaged with him in making up the train. He knew that this cut of cars had been pulled over the switch for some purpose. He knew that the train stopped just after it passed over the switch and that it was not going to stand there indefinitely. He well knew that in switching about in the yards the engine started and stopped suddenly. He knew that this was the usual

and customary way to handle a switch engine when it was doing that which was being done with this switch engine. The engineer knew that the fireman was well acquainted with these facts. With this knowledge the engineer was entitled to presume that the fireman understood what was about to take place. There was no thinkable reason, therefore, for the engineer to presume that the fireman would, at this particular juncture, undertake to board the engine. Unless the engineer knew or had reason to believe that the fireman was about to board the engine, he was not obligated to take such an effort into consideration when handling the engine. That which it was obvious was about to be done was information to the fireman that he ought not to try to board the engine at that particular moment. The engineer had a right to believe that he would not undertake to do that which he ought not to do. The engineer was not negligent in presuming that the fireman would be careful.

The whole case rests upon the proposition that the engineer was negligent in not presuming that the defendant in error was about to do a negligent thing.

The principle announced in *Aerkfetz v. Humphreys*, 145 U. S. 418, is destructive of defendant in error's case. The question there involved was whether the engineer of a switch engine was negligent in failing to anticipate or expect that a track-worker would assume a dangerous posture and place, in a railroad switching yard. The Court said:

> "As an employe of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine.
>
> * * * * * * * *
>
> He knew that the switch engine was busy moving cars and making up trains, and that at any minute

> cars were likely to be moved along the track upon which he was working. With that knowledge he places himself with his face away from the direction from which cars were to be expected, and continues his work without ever turning to look. Abundance of time elapsed between the moment the cars entered upon the track upon which he was working and the moment they struck him. There could have been no thought or expectation on the part of the engineer, or of any other employe, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employe, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars.
>
> * * * * * *
>
> The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach."

There was no obligation on the engineer to observe and take notice of the time when and circumstances under which the defendant in error would undertake to board the switch engine. In the absence of such an obligation resting on him, the engineer was not negligent in "not observing and taking notice of the fireman," and yet the basis of his right to recover was cast on that proposition. (Rec. p. 25.) The failure to observe and take notice of a person, under given circumstances, can only become actionable negligence when there is a duty to do so.

See authorities, *Proposition of Law*, No. 4.

In the *Ballentine* case, *supra*, it was said:

> "We ruled in *Goodlander Mill Co. v. Standard Oil Co.*, 24 U. S. App. 7-12, 11 C. C. A. 255, and 63 Fed. 401, that 'it is not every one who suffers loss from another's negligence who may recover therefor. Negligence, to be actionable, must occur in breach of a legal duty arising out of contract or otherwise, owing to the person sustaining the loss. *Kahl v. Love*, 37 N. J. Law, 5; *Bank v. Ward*, 100 U. S. 195. Mr. Wharton defines 'legal duty' to be 'that which the law requires to be done or forborne to a determinate person, or to the public at large, and as correlative to a right vested in such determinate person or the public at large.' *Whart. Neg.*, 2d Ed.), Sec. 24."

In the *Hawks* case, *supra*, it was said:

> "Before liability attaches a duty must arise—a duty on the part of the party charged toward the party injured."

In the *Cook* case, *supra*, it was said:

> "All actions for damages on the ground of negligence depend on failure of duty of the defendant—failure to exercise ordinary care—a legal wrong to the defendant."

In *Personal Injuries on Railroads*, *supra*, at Art. 19, it was said:

> "In all cases, it is essential that there should be combined both a breach of duty to the plaintiff and an injury resulting proximately from such violated duty."

As to Plaintiff in Error's Special Request,

Specification of Error No. 3:

Attention is called to the statement of the learned attorney for defendant in error that there was no evi-

dence that the engine was moving when the defendant in error attempted to board it, and, hence, it is argued that there was no proof as to which the request preferred by the plaintiff in error (Rec. p. 51), was applicable.

The declaration, as originally filed, averred that the defendant in error took hold of the engine when it "*was moving slowly forward.*"

Rec. p. 2.

This averment appears in parenthesis and the confusing form of the declaration in that behalf arose from an amendment by interlineation. After the proof had been heard and arguments made, the defendant in error applied to the trial court for leave to strike out the averment that the engine was slowly moving forward when he took hold of it and insert in lieu thereof the averment that the engine was standing still when he took hold of it.

Rec. p. 45.

So, as to the defendant in error taking hold of the engine while it was slowly moving and just prior to the sudden jerk incident to a kicking switch, there was an original averment by the defendant in error that such was the fact.

Shortly after the defendant in error was injured he made a written statement to the claim agent of the company as to the circumstances attending his injury and therein said that he took hold of the hand-holds of the engine when "*the engine was moving* about two miles an hour."

Rec. p. 23.

He likewise said that he did not notice "any rough or unusual handling of the engine," (Rec. p. 24), and that a lurch of the engine caused him to miss his foothold.

Rec. p. 23.

The defendant in error testified that at the time he made the statement he was suffering and did not really know what he was saying.

Rec. p. 20.

The claim agent of the company testified that the statement was written at the dictation of the defendant in error and was read over to him and that he understandingly signed it.

Rec. p. 37.

Dr. G. B. Thornton, who attended the defendant in error and saw him on the day that he made the statement, testified that he was entirely rational and capable of giving an intelligent account of the occurrence.

P . pp. 39-40.

Dr. A. W. Rudisill testified to exact' .ae same effect.

Rec. pp. 41-42.

The evidence, therefore, which was made the basis of an incidental statement in the requested instruction, consisted of the admission of the defendant in error in writing; his statement to the claim agent of the company which was reduced to writing and signed by him, and his original statement in the pleadings filed in his name and behalf.

However, the language of the special request, with respect to the particular moment the defendant in error took hold of the engine, is so utterly immaterial that it would not devitalize the material part of that request. It is believed, however, that there was some evidence to sustain that statement, because there was evidence that the defendant in error consciously and understandingly admitted that he had undertaken to board the engine when it was moving, and this was his original averment.

The real reason why the defendant in error denied that statement and repudiated his original averment was that he knew it to be a violation of the rules of the com-

pany to undertake to get upon an engine while in motion, said rule being as follows:

> "Every employe must exercise the utmost caution to avoid injury to himself or to his fellows, especially in the switching of cars, and in all movements of trains, in which work each employe must look after and be responsible for his own safety. Jumping off or on trains or engines in motion, getting between cars to couple or uncouple them, and all similar imprudences are dangerous and in violation of duty. All employes are warned that if they commit these imprudences it will be at their own peril and risk."
>
> Rec. p. 19.

A fact may be established by the admission of an interested party, even though he may deny that fact when testifying as a witness at the trial. Though the defendant in error testified that the engine was not in motion when he undertook to board it, his own statement to the contrary was *some* evidence that it was in motion, as it was an admission against interest. If the jury believed that he consciously and understandingly made the statement at a time when there was no temptation to him to misstate the facts, it was sufficient evidence to justify the jury in finding that the statement was true.

McNeil v. Holbrook, 12 Pet. 84.
Downey v. Hicks, 14 How. 240.
Beckwith v. Bean, 98 U. S. 266.

Tried, as this case was, on the theory that the doctrine of assumption of risk no longer obtained; on the theory that the engineer owed an obligation to keep watch and ward over the movements of the fireman; on the theory that the making of a kicking switch in the yards of the company might be held by the jury to be a negligent act; on the theory that it was the duty of the engineer to see and know that the fireman was in a place of safety

before a usual and ordinary switching operation was performed, it is quite clear that the merits of the case were not reached and instead of this being a case which should be affirmed because the propositions relied upon are frivolous, it seems that it is a case which should be reversed because of plain errors committed against plaintiff in error.

Respectfully submitted,

CARUTHERS EWING,

Attorney for Southern Railway Co.

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 645.

SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

W. O. GADD, DEFENDANT IN ERROR.

REPLY BRIEF FOR THE SOUTHERN RAILWAY COMPANY.

CARUTHERS EWING,
Attorney for Southern Railway Company.

L. E. JEFFRIES,
Of Counsel.

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REPLY BRIEF FOR THE SOUTHERN RAILWAY COMPANY.

As this case is on the summary docket and the time for argument limited, it is deemed important that the question of plaintiff in error's right to a directed verdict be more fully exhibited to the court.

The brief for the defendant in error, filed March 28, 1914, was seen by me for the first time on April 6, 1914, and it is desired, in making reply thereto, to state the insistence of the plaintiff in error with respect to the claim of non-liability.

It is true, as set out in the brief for defendant in error, that the declaration alleged that it "was well known to said engineer," that is, the engineer operating the switch engine, that defendant in error "was in the act of stepping on the steps leading to the cab on said engineer's side" at a time when the engineer suddenly applied the steam in the making of a "kicking switch." This cast the right to recover on the proposition that the engineer, *knowing* that the defendant in error was in the act of boarding the engine, undertook to make a "kicking switch" which would in all human probability result in throwing defendant in error and inflicting injury upon him.

A "kicking switch" requires such a sudden and jerky or snapping movement that any engineer would know the danger, or it might be said would know that injury would surely and certainly be inflicted upon a person who was in the act of boarding an engine at the time such "kicking switch" was made.

The nature and character of a "kicking switch" were detailed by the defendant in error and from his statement it is clear that the engine must be, in making such switch, suddenly started, and it is necessary to give "a kick or jerk" (Record, 20), that is, a "kicking switch" involves "a sudden start" (Record, 25).

It might, with much force, be urged that the engineer was not guilty of negligence if, with knowledge of the perilous position of the defend-

ant in error, he did that which must inevitably result in harm to him. This would savor more of a willful and malicious act, that is, the deliberate inflicting of an injury.

However, the declaration, as above stated and as correctly stated in the brief for the defendant in error, cast the right to recover on the engineer's *knowledge* of the precarious and perilous position of the defendant in error when the "kicking switch" was made.

The Circuit Court of Appeals apparently predicated its affirmance of this judgment on the idea that this averment of the declaration was supported by some evidence and that the engineer saw the defendant in error in his precarious and perilous posture when the steam was suddenly applied for the making of a "kicking switch" (Record, 69).

The proposition here submitted is that the engineer's knowledge of the position of the defendant in error, at the time the "kicking switch" was made, was not the theory of the defendant in error at the trial and was not the proposition on which he cast his right to recover. This is too clear for argument when the court is made acquainted with what was said by the attorney for the defendant in error at the hearing as to the sole basis of asserted liability. When defendant in error was on the witness stand and was being cross-examined with respect to imperfections of the engine, etc., alleged in the second count of the declaration as a

right of action, the trial judge inquired of the attorney for the defendant in error as to whether reliance was placed on the averments of the second count of the declaration and received the following reply:

> "NO, SIR, JUST IN REGARD TO THE NEGLIGENCE OF THE ENGINEER IN NOT OBSERVING AND TAKING NOTICE OF THE FIREMAN THERE AND STARTING WITHOUT WARNING."
>
> (Record, 24-25.)

Thus, by the above statement, which is clear, distinct and definite, the right to recover was cast upon the idea that *the engineer did not in fact see* the defendant in error, and *did not in fact know* that he was in a place of peril when the power was suddenly applied to the engine. Just exactly the reverse is now said to be the basis of defendant in error's claim and the negligent act upon which the defendant in error relies for a recovery.

"Negligence of the engineer" was said, at the hearing, to consist in his *failure* to observe and take notice of the fireman. That is to say, the imputed negligence was that the engineer *failed to observe* and take notice of the defendant in error "there," that is, at the place he was when the power was suddenly applied, whereas the declaration stated just the reverse of this as the basis of defendant in error's right of action.

When the court gets clearly in mind the marked and manifest difference between the engineer's act in suddenly starting the engine *when he knew* that defendant in error was in a place of peril and the

alleged negligence in *failing to know* that defendant in error was in a place of peril, the utter absence of evidence on which to base this judgment will be obvious.

Had the case been tried on the declaration as originally framed, to wit, on the averment that the engineer knew that the defendant in error was attempting to board the engine when the power was suddenly applied, a wholly distinct and different question would be presented for determination.

The plaintiff in error had an absolute right to rely upon the statement made in open court and during the progress of the trial as to what negligence was imputed to it. It accepted as authoritative and conclusive the statement of the attorney for the defendant in error that the engineer's *ignorance*, rather than the engineer's *knowledge*, of the situation of the fireman was the question to be determined, and the determination of which controlled the rights of the parties.

When the attorney for defendant in error avowed in open court that the negligence of which complaint was made was the engineer's failure to know the whereabouts of the fireman, then but one question was presented, to wit, was this *ignorance* on the part of the engineer or this *failure* to take note of the whereabouts of the fireman a negligent act under all the facts and circumstances?

The announcement by the attorney for defendant in error of the particular and specific negligence imputed to the company caused the company's attorney to go no further with the cross-ex-

amination of the defendant in error. The company became no longer concerned with the idea that the engineer *saw* the defendant in error, but relied on the assurance that the predicate for a recovery was that he *did not* see him. For instance, had the case been prosecuted on the theory that the engineer *saw* the fireman it would have been of prime importance to the company to have shown the size or height of the engine, the location of the engineer's window as it related to the step from which the fireman was thrown, the number of other employees carrying lights about the engine, the exact position of the switchmen who were giving signals. All of these things would have been material had the fact to be determined by the jury been whether the engineer *saw* the fireman at the time. The jury has never passed on the fact which it is now said entitles the defendant in error to a judgment. The defendant in error stated that his case was bottomed on the alleged negligent failure of the engineer to see him, and it operates as an imposition on plaintiff in error unless he is restricted in the Appellate Court to the theory adopted at the trial.

Lesser Cotton Co. et al. vs. St. L., I. M. & So. Ry. Co., 114 Fed., 133, 142.

Bort vs. E. H. McCutchen & Co. et al., 187 Fed. R., 798.

New York, etc., R. R. Co. vs. Estill, 147 U. S., 591.

Virtue vs. Creamery Package Mfg. Co., 227 U. S., 8, 38, 39.

There is an irreconcilable conflict between negligence predicated on the engineer's *knowledge* of the whereabouts of the fireman and the sudden starting of the engine with this knowledge—the negligence in such event consisting in the sudden starting of the engine, and the sudden application of power by the engineer in *ignorance* of the whereabouts of the fireman—the negligence, if any, in the latter event, being the failure of the engineer to keep watch and ward over the fireman. In the former case the negligence would rest in a breach of the duty the engineer owed to the fireman not to set the engine in motion when he knew that the fireman would be thereby injured, whereas the negligence, if any, in the latter case, would consist in the engineer's failure to observe and take notice of the whereabouts of the fireman before setting the engine in motion.

It is submitted that, as the defendant in error cast his right to recover at the hearing on the latter theory, this judgment must be affirmed or reversed, as this court holds that it was or was not negligence on the part of the engineer *to fail to observe* and take notice of the whereabouts of the fireman under the circumstances then existing.

The Employers' Liability Act cannot be so extended by construction as to impose an obligation upon an engineer which without the Act did not rest upon him.

The Employers' Liability Act did not in any degree alter the general rules of law with respect to what does or does not constitute negligence.

The Employers' Liability Act, in so far as applicable to this case, simply made the railway company liable for injuries inflicted by the negligence of the engineer. It neither enlarged nor diminished the degree of care that the engineer should have exercised, nor did it widen or broaden the scope of negligence.

The inquiry then recurs: Was the engineer negligent *in failing to observe* the movements and take notice of the whereabouts of the fireman at a time when he was about to make a "kicking switch"?

What had taken place prior to the time when the defendant in error left the running-board of the engine and started back toward the cab is immaterial except as to one proposition, to wit, that as the engineer had told the fireman to examine the drive-wheel and find out the cause of the sparks which had been seen flying therefrom, he might have known that he was on the ground.

There is considerable proof in the record as to the fireman having left the engine prior to the time he was hurt and as to the circumstances under which the engine was then moved and as to who was in the engine cab at the time, but none of these questions are of importance *in determining the duty* resting upon the engineer in the situation and under the circumstances existing at the time the fireman was injured. The fireman was injured by a later and independent movement.

The fireman had finished the examination he had been requested to make and the engine had

proceeded some distance from the point where the fireman had made this examination; the fireman had stepped from the running-board on which he had been riding after completing the examination and was in the clear—that is, in a place of perfect safety—when subsequent events transpired, as will now be set out.

Commencing with the time when the engine stopped and the fireman (defendant in error) left the running-board of the engine, the latter's whole evidence, as to his subsequent conduct and course, is:

> "I stepped off (the front running-board) and walked back to get in the cab, my torch burning all the time. *Just as I turned* and made an effort to get on, the engine started forward (Record, 14).
>
> "It (the engine) started off right at the time that I attempted, or when I was in the act of boarding it, in plain view of the engineer" (Record, 21).

The most, therefore, that can be made of the fireman's statement is that he left the front running-board and walked back to get in the cab, carrying a lighted torch, and had the engineer been looking at him or watching out for him he could have seen him; that the engine was suddenly started just as the fireman "turned and made an effort" to board the engine.

The foregoing constituted the undisputed evidence as to the movements of the fireman.

The following constitutes the undisputed evidence of the engineer: The engineer was watching the switchmen and did not know that the fireman was on the ground and was not paying any attention whatever to him (Record, 32-33, 36).

The engineer was looking north and his entire attention was addressed to the signals which he was expecting the switchmen to give (Record, 33), and that "as a general thing the fireman is up and down on the ground often" (Record, 36).

So, it is undisputed, and must be taken as established, that the fireman, in the making up of a train, is frequently in the cab of the engine and frequently on the ground about the engine; that the engineer was watching switchmen for signals and leaning out of the cab window with his attention fixed on those in front of him; that the fireman was beneath him, being on the ground, and had passed by him, and having gotten by him, that is, behind him, *turned* and undertook to board the engine; that the engineer, having his attention fixed upon the switchmen and giving necessary attention to the business of making up the train, failed to see what the fireman was doing.

If such *failure* was, under the facts and circumstances, negligence, then the railway company is liable, nothing else appearing.

The foregoing must be considered in connection with the further undisputed evidence that the movement of the engine was the usual and ordinary movement incident and necessary to the work

then being done (Record, 20, 25), and that it was obvious to any man familiar with the movement of switch engines in the making up of a train that a "kicking switch" was, at this particular moment, about to be made.

If the court imposes upon an engineer, engaged in making up a train in the yards of the company, the duty of keeping watch and ward over the fireman when he is on the ground and neither in front of nor behind the engine, and imposes a liability upon the railway company should the engineer fail to do this and the fireman be injured, it will practically destroy the ability of an engineer to make up a train.

The engineer, handling a switch engine under these circumstances, can only give attention to the track in front of and behind him and follow the signals given him by switchmen.

He has a perfect right to presume that an experienced fireman (and this fireman was also an engineer who was in the habit of making up trains in the yards of the company; Record, 20, 25), will take notice of the usual and ordinary movements of the engine rather than require him to take notice of every movement of the fireman. What the engine is doing and is about to do could not be misunderstood by any experienced railroad man working in the switching yards of a railway company. Should the company place in this situation an immature or inexperienced person, a different question would be presented. The particular question

here presented is whether the engineer was negligent *in failing to follow the movements of the fireman* at a time when the fireman was on the ground and neither in front of nor behind the engine and at a time when the fireman, to the engineer's knowledge, understood and knew that a train was being made up and likewise understood and knew that, in the making up of said train, the engine would be started with a sudden or jerking movement, that is, the movement usual and incident to making a "kicking switch."

If it be true that a party cannot base his right to recover on one theory in a lower court and in an appellate court base his right to recover upon an exactly opposite theory, then this judgment cannot be sustained unless the court imposes such a burden upon the engineer of a switching crew, engaged in making up a train, that his usefulness will be destroyed and the service of the railway company seriously embarrassed.

It imposes no hardship on a fireman who, in the making up of a train is often in the cab of the engine and often on the ground to require that he take note of his surroundings and make such observation as the exigencies of the case may require. It is a thing he can readily do without hampering or hindering other servants of the company in the performance of their duties. If the engineer is expected to look out for him and see where he is and what he is doing before an engine is moved, while switching about in a railroad yard

making up a train, then it would be incumbent upon the engineer to practically abandon the service he is expected to perform in order to prevent an injury to one who ought to be able to take care of himself without interrupting the work being done or service being performed.

Of course, if the engineer saw the fireman in a place of peril then he would not be permitted to do that which might be reasonably expected to result in harm to him. If, however, he does not see the fireman, and if the thing that he is doing requires that he address his attention to other employees, he is guilty of no negligence toward the fireman unless the court holds that he owes the fireman the duty to so follow his movements as to make sure that no movement of the engine will result in injury to him.

Negligence, that is, the absence of the exercise of that care which a reasonably prudent person would exercise under given circumstances, cannot be imputed to the engineer because he failed to correctly interpret the movements of the fireman, unless a reasonably prudent person, handling a switch engine in the yards of a railway company in the making up of a train, should indulge the presumption that a fireman, who is on the ground and who sees and knows of the movement of the engine about to be made, would undertake to board the engine at an inopportune time. If the engineer, as a matter of law, must indulge the presumption that the fireman would undertake to board

the engine at this inopportune time, then it would be negligence in the engineer to move the engine until the fireman was safely aboard, or it might be that it would become his duty to warn the fireman not to make an effort at that time to board the engine.

The gravamen of defendant in error's case is that a duty rested upon the engineer to watch his movements and correctly interpret them. If the engineer had watched the fireman he would have simply seen him walking along beside the engine. This would have conveyed no information to him that the fireman would, on passing him, turn toward the steps and try to enter the cab of the engine.

No duty rested upon the engineer to follow the movements of the fireman and correctly interpret those movements, or, as long as the fireman was on the ground to keep the engine still. To so require would unduly hamper and embarrass a railway company in the making up of a train in its yards. An affirmance of this judgment must go to this extent.

It is believed that in no reported case can there be found the imposition upon an engineer of the duty and obligation with respect to the fireman that the affirmance of this judgment will, on this record, impose.

Reasonable men, it is respectfully submitted, cannot entertain different opinions as to the freedom of the engineer from negligence on the facts

of this record. Before there can be a recovery the law must be declared, as the trial judge declared it, to wit: that when the fireman was on the ground the engineer was not entitled to move the engine until he *knew* that the fireman was in a place of safety. Without regard to the charge of the court, or special requests, or to the exceptions taken, it is not possible to affirm this judgment except upon the theory that when a fireman leaves an engine, as he often does in the yards of a railway company while and when a train is being made up, the railway company becomes an insurer that he will not be injured by any movement of the switch engine, because, by the undisputed evidence in this case, the engineer did nothing more nor less than set this engine in motion, in the usual and ordinary way, without observing and taking notice of the whereabouts of the fireman.

Respectfully submitted,

CARUTHERS EWING,
Attorney for Southern Railway Company.

L. E. JEFFRIES,
Of Counsel.

SOUTHERN RAILWAY COMPANY *v.* GADD.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 645. Argued April 15, 1914.—Decided May 11, 1914.

In a case in which the writ of error directed to the Circuit Court of Appeals is based on the Employers' Liability Act, but presents for decision no question concerning the interpretation of that act, but only considerations of general law, this court, while it has power to consider all such questions, will not reverse as to such questions unless it clearly appears that error has been committed.

Although the trial court in replying to counsel may have followed counsel in erroneously referring to assumption of risk instead of contributory negligence and negligence of fellow-servants, if assumption of risk was not involved in the action or referred to in the testimony, the error, if any, was not prejudicial.

Where the record shows that the case was carefully and fully considered in both of the courts below and the contentions advanced to support the assertion that the interpretation of the Employers' Liability Act is involved are so frivolous as to justify the conclusion that the writ of error is prosecuted for delay, this court will impose a penalty, in this case of five per cent. upon the amount involved, under paragraph 2 of Rule 23.

207 Fed. Rep. 277, affirmed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 as amended 1910, are stated in the opinion.

Mr. Caruthers Ewing, with whom *Mr. L. E. Jeffries* was on the brief, for plaintiff in error:

The fact of injury to a servant carries with it no presumption of negligence on the part of the master, under the circumstances of this case. *Tex. &c. R. R. Co.* v. *Barrett*, 156 U. S. 617; *Patton* v. *Tex. &c. R. Co.*, 179 U. S. 658; *Looney* v. *Met. Ry. Co.*, 200 U. S. 480; Labatt's

Master & Servant (2d ed.), Art. 1604, p. 4898; *G. Nor. Ry. Co.* v. *Johnson*, 176 Fed. Rep. 328; *Midland Valley R. Co.* v. *Fulgham*, 181 Fed. Rep. 91.

A master is not an insurer of the safety of his servants, but must exercise reasonable care to protect them from injury. *Hough* v. *T. & P. R. R. Co.*, 100 U. S. 213; *W. & G. R. Co.* v. *McDade*, 135 U. S. 554; *U. P. Ry. Co.* v. *O'Brien*, 161 U. S. 451; *C. O. & G. R. Co.* v. *Tennessee*, 191 U. S. 326; *M. & O.* v. *Yockey*, 103 Fed. Rep. 265; *Sandige* v. *A., T. & S. F. R. R. Co.*, 193 Fed. Rep. 867; *Narramore* v. *C., C., C. & St. L. R. R. Co.*, 96 Fed. Rep. 298; *Maue* v. *Erie R. R. Co.*, 198 N. Y. 221; *Lancaster* v. *A., T. & S. F. R. R. Co.* (Mo.), 127 S. W. Rep. 607; *I. & G. N. R. R. Co.* v. *Schubert* (Tex.), 130 S. W. Rep. 708; White on Personal Injuries on Railroads, Art. 251.

Making a kicking switch, in the usual and customary manner, even though it involves a sudden movement of an engine, with a jerk or snap, is not negligence. *Randall* v. *B. & O. R. R. Co.*, 109 U. S. 478; *C., M. &c. R. R.* v. *Voelker*, 129 Fed. Rep. 532; *Olds* v. *R. R. Co.*, 178 Massachusetts, 73; *Worcester* v. *Ry. Co.* (Tex.), 91 S. W. Rep. 339; *Davis* v. *B. & O. R. R. Co.*, 152 Pa. St. 314; *Skinner* v. *Cen. Vt. R. R. Co.*, 73 Vermont, 336; *Dumas* v. *Stone*, 65 Vermont, 442; *Guffey* v. *H. & St. J. Ry. Co.*, 53 Mo. App. 462; *Hedrick* v. *Mo. Pac. Ry. Co.*, 195 Missouri, 104; *C. & A. R. R. Co.* v. *Arnol*, 144 Illinois, 261; *Cen. R. R. Co.* v. *Sims*, 80 Georgia, 749; *S. W. Tel. Co.* v. *Woughter*, 56 Arkansas, 206; *Rutledge* v. *Mo. Pac. Ry. Co.*, 110 Missouri, 312; *Youll* v. *S. C. & P. Ry. Co.*, 66 Iowa, 346; *Hunt* v. *Hurd*, 98 Fed. Rep. 683; *L. & N. R. R. Co.* v. *Smith*, 129 Alabama, 553; *Carr* v. *St. Clair Tunnel Co.*, 131 Michigan, 392; White on Personal Injuries, Arts. 330, 331; *Allen* v. *A. C. L. R. Co.*, 49 A. & E. R. R. Cas. (N. S.), 576; *Schaible* v. *L. S. & M. R. R. Co.* (Mich.), 21 L. R. A. 660.

The failure of the engineer to observe and take notice

of the defendant in error, under the circumstances, was not actionable negligence because the engineer owed the defendant in error no duty to keep watch and ward over him. A proper discharge of his duties, as engineer, made it impossible that he could keep track of the movements of the fireman. *C., C., C. & St. L. Ry. Co.* v. *Ballentine*, 84 Fed. Rep. 933, 937; *Goodlander Mill Co.* v. *Standard Oil Co.*, 63 Fed. Rep. 401; *Savings Bank* v. *Ward*, 100 U. S. 195, 202; *Aerkfetz* v. *Humphreys*, 145 U. S. 418; *Bottum's Admr.* v. *Hawks*, 84 Vermont, 370; *Cook* v. *Rice Lake Milling Co.*, 146 Wisconsin, 535; 1 White on Personal Injuries, Arts. 19, 322.

There is no conflict in the evidence sufficient to carry the case to the jury on the question whether the engineer did or did not see defendant in error while he was on the ground and about the steps of the engine cab. Evidence that defendant in error was there to be seen and had a torch which would have made him visible to anyone looking for him, or whose duty it was to look for him, does not create a conflict with the affirmative statement of the engineer that he did not see him and did not know he was there, especially when the engineer explains why he did not see him and why he did not know he was there. And the case of defendant in error was stated, at the trial, as based on the proposition that the engineer did not see him. *B. & O. R. R. Co.* v. *Baldwin*, 144 Fed. Rep. 53; *McMillan* v. *Grand Trunk Ry. Co.*, 130 Fed. Rep. 827.

A party will not be permitted to take one position at the trial and demand a judgment or verdict based thereon and, thereafter and in the appellate court, be heard to assert that what he stated at the hearing as the determinative question was not the real basis of his claim. *N. Y., Lake Erie & W. Ry. Co.* v. *Estill*, 147 U. S. 591; *Badger* v. *Ranlett*, 106 U. S. 255; *San Juan Light Co.* v. *Requena*, 224 U. S. 89.

The defense of assumed risk was not abolished by the

Employers' Liability Act, except to the extent that the employé does not assume the risk of his employment where the violation by the carrier of a statute enacted for the safety of the employé caused or contributed to his injury. The act does not affect the doctrine of assumption of risk as it relates to the ordinary and usual hazards of the master's service. *Bowers* v. *R. R. Co.* (Ga.), 73 S. E. Rep. 677; *Freeman* v. *Powell* (Tex.), 144 S. W. Rep. 1033; *Parker* v. *Pac. &c. R. R. Co.* (Kans.), 129 Pac. Rep. 1151; *Hall* v. *Vandalia R. R. Co.*, 169 Ill. App. 12; *Neal* v. *Idaho &c. R. R. Co.*, 22 Idaho, 74.

Authorities recognizing the existence of the defense of assumption of risk are: *Seaboard Air Line* v. *Moore*, 228 U. S. 433; *Amer. R. R. Co.* v. *Birch*, 224 U. S. 547; *Cen. R. Co.* v. *Colasurdo*, 192 Fed. Rep. 901; *Sandige* v. *A., T. & S. F. Ry. Co.*, 193 Fed. Rep. 867.

While the defense of contributory negligence was abolished, the defense of assumption of risk was, by § 4 of the act, left unimpaired, except in cases based on violation of statutory duty.

There is a wide distinction between contributory negligence and assumption of risk, the question of assumption of risk being quite apart from that of contributory negligence. *Schlemmer* v. *Buffalo &c. Ry. Co.*, 220 U. S. 590, 596; *R. R.* v. *McDade*, 191 U. S. 68; *Tuttle* v. *Ry. Co.*, 122 U. S. 189; *Sou. Pac. Ry. Co.* v. *Seley*, 152 U. S. 145.

Mr. John L. Stout for defendant in error.

Mr. Chief Justice White delivered the opinion of the court.

The defendant in error on this record sued the railway company, the plaintiff in error, to recover damages for personal injuries alleged to have been suffered through its negligence. The cause of action was expressly based

upon the Employers' Liability Act,[1] it being averred that at the time of the injury the plaintiff as an employé of the defendant was assisting in the actual movement of interstate commerce transportation in which the defendant company was then engaged. The case is here on error prosecuted by the Railway Company to a judgment of the court below affirming a judgment of the trial court upon a verdict. (207 Fed. Rep. 277).

In *Chicago Junction Ry.* v. *King*, 222 U. S. 222, it was held that as the pleadings in that case based the right to recover upon an act of Congress, the Safety Appliance Law, there was power in this court to review the judgment of a Circuit Court of Appeals—an authority which carried with it the duty to consider and pass upon all questions for decision in the case even although they might not concern the interpretation of the act of Congress upon which the suit was based. But while thus ruling it was nevertheless declared that as questions of common law negligence not involving the interpretation of the statute fell within the classes of questions which under the distribution of judicial power made by the act of 1891 (reëxpressed in the Judicial Code) were determinable by the Circuit Court of Appeals in last resort, where such questions were brought here from a Circuit Court of Appeals because they arose in a suit under the statute, and which for that reason alone could come here, whilst considering we would not reverse as to such questions unless it clearly appeared that error had been committed. Besides establishing this rule it was further said that in disposing of such questions we would not feel it our duty to re-state the case and reëxpound the principles applicable to its decision below, but would as a general rule leave those subjects where the Circuit Court of Appeals had left them, and

[1] The Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291.

would hence content ourselves with merely expressing our ultimate conviction of the case as formed after an adequate examination of the record. The principles announced in the *King Case* were subsequently expressly reiterated and applied in *Seaboard Air Line* v. *Moore*, 228 U. S. 433 and *Chicago, R. I. & Pac. Ry.* v. *Brown*, 229 U. S. 317. And in both of these latter cases it was recognized that the ruling in the *King Case* was equally applicable to cases brought here from the Circuit Court of Appeals on the ground that the relief sought was based on the Employers' Liability Act where the cause of action arose since the adoption of the Judicial Code.

Coming to the case made by this record, although as we have said, it is manifest that the cause of action was based upon the Employers' Liability Act, we are of the opinion that it presents for decision no question concerning the interpretation of that act since all the questions which require to be decided merely involve considerations of general law depending in no sense upon the particular significance of the Employers' Liability Act. Under these conditions it is apparent that the case is absolutely controlled by the *King Case*, and we therefore content ourselves with saying that as after an adequate examination of the record we find no ground whatever affording a clear conviction that error was committed, affirmance must follow.

This disposes of the entire case, but as it is insisted that two propositions which it is asserted involve the meaning of the Employers' Liability Act arose upon the record and require to be decided, we come not to decide the propositions but to point out the absolute want of merit in the contention that they arose on the record for decision. The first contention is based upon the refusal of a request made by the defendant to take the case from the jury by a peremptory instruction. Granting that in its ultimate analysis the request involved an appreciation of the

Employers' Liability Act, nevertheless we are of opinion that the absolute want of merit in the proposition in view of the state of the proof caused the request intrinsically considered to be so unsubstantial and frivolous as not to furnish any support for the contention that its refusal raised a question concerning the interpretation of the statute.

The second contention rests upon the assumption that the court below affirmed a supposed action of the trial court in erroneously instructing the jury that the effect of the Employers' Liability Act was to abolish the doctrine of assumption of risk. The proposition is thus stated in the opening sentences of the argument of the plaintiff in error: "The trial judge held that said Employers' Liability Act abolished the defense of assumed risk so that the construction of the act is here involved." A brief statement of the condition of the record on the subject is necessary to demonstrate the entire want of foundation for the proposition. The plaintiff was a locomotive fireman, and the controversy in the case was whether the personal injury which he suffered was occasioned by the reckless and negligent conduct of the engineer in moving the engine under the circumstances disclosed by the proof. In its general charge, the court had instructed the jury that the plaintiff was entitled to recover if they believed the testimony of the plaintiff which disclosed an unusual and reckless movement of the engine by the engineer after he had directed the fireman to descend from the engine to ascertain whether there was a defect in its mechanism. Coming then to consider special charges asked by the respective parties, the court gave a charge requested by the plaintiff as follows: "If you believe from the evidence that the plaintiff was directed by the engineer Hunter to get off the engine and examine the engine for defects, then while said plaintiff was obeying the direction of Hunter, it was Hunter's duty to look out for plaintiff and not move

the engine until he knew that plaintiff was in a position of safety." Upon the giving of this charge the defendant excepted as follows: "I want to take exception to that last statement on the ground that the fact that he moved up that engine if he was in a place of safety is not stated to be any cause of action in this case, and not involved in the pleadings, and he was not injured by virtue of it." And the counsel added: "We further except to the statement that the court made to the jury (evidently referring to the general charge) that if they believe the facts as stated by the plaintiff which left out of question the doctrine of assumed risk." In response to which the court said: "I understand that the doctrine of assumed risk is abolished by the Employers' Liability Act, in so far as it relates to cases wherein the servant is injured because of the negligence of any of the officers, agents or employés, etc., of the carrier and contributory negligence is modified so as that it no longer bars the right of action but goes in reduction of the amount of recovery. But you reserve your exception." From this statement it is evident that no charge whatever was given by the court concerning the assumption of risk and hence that no exception was or could have been taken to any such charge, and that the exception which was reserved concerned the special charge as to the conduct of the engineer and the portion of the general charge concerning liability if the testimony of the plaintiff as to the negligence of the engineer was believed, the exception as to the latter having been placed on the ground that the court had been silent as to assumption of risk. And it is equally clear that this view is not affected by taking into account the reply of the court to the comment of counsel. We say this because while the reply echoed the counsel's mistaken use of the words "assumed risk," by the qualification which it affixed to these words, it clearly conveyed that as the matters to which the excepted charge related purely concerned the common law

principles of fellow-servant and contributory negligence, they were controlled by the provisions of the statute. And this becomes certain when it is borne in mind that there was nothing in that portion of the general charge which was excepted to which in any possible view was relevant to the doctrine of assumption of risk. If there were room for the slighest doubt on the subject it is dispelled by the following considerations: (a) because the record contains no intimation of any request for instruction concerning assumption of risk made by the defendant; (b) because although the elaborate application for a new trial stated many alleged grounds, not the slightest reference was made to any supposed error committed with reference to the mistaken construction of the statute concerning assumption of risk which is now relied upon; (c) because while in the assignments of error made for the purpose of review by the Circuit Court of Appeals the special charge in connection with which the colloquy between court and counsel took place was referred to and error assigned concerning it for specified reasons, no reference was made to the alleged mistake which is now relied upon concerning the wrongful interpretation of the statute as to assumption of risk. It may indeed be inferred that in the argument in some form alleged error on such subject was called to the attention of the Circuit Court of Appeals since that court in its opinion considered and disposed of the subject by directing attention to the qualifying words used in the remarks of the trial judge, and to the fact that as assumption of risk was not at all involved in the testimony to which the charge related, no prejudicial error could have arisen. Certain is it however that in the assignments of error made for the purposes of review by this court no complaint whatever was made of the alleged mistake concerning the operation of the statute upon the doctrine of assumed risk.

Before coming to order the judgment of affirmance

which is the necessary result of what we have said, we briefly state the considerations which lead us to the conclusion that our duty is in directing such judgment to award interest by way of damages for delay under the terms of the second paragraph of Rule 23. It is manifest on the face of the record that the case was carefully and fully considered in both of the courts below. In view of the ruling in the *King Case* and of what we have said concerning the contentions advanced to support the assertion that the interpretation of the statute was here involved, we think the conclusion that the writ of error was prosecuted only for delay is plainly justified and that a penalty by way of damages should be imposed. The judgment below is therefore affirmed with five per cent. upon the amount of the judgment in addition to the interest allowed by law.

Affirmed with interest and five per cent. damages.